Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1975

No. 76-56

**TOBACCO WORKERS' INTERNATIONAL UNION AND LOCAL 182, TOBACCO WORKERS' INTERNATIONAL UNION,** Petitioners,

*versus*

**JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH AND PERCY TAYLOR, each individually and on behalf of all other persons similarly situated;**

**THE AMERICAN TOBACCO COMPANY;**

**AMERICAN BRANDS, INC.;**

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,** Respondents.

## JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**TOBACCO WORKERS' INTERNATIONAL UNION AND LOCAL 182, TOBACCO WORKERS' INTERNATIONAL UNION,** **Petitioners,**

*versus*

**JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH AND PERCY TAYLOR, each individually and on behalf of all other persons similarly situated;**

**THE AMERICAN TOBACCO COMPANY;**

**AMERICAN BRANDS, INC.;**

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,** **Respondents.**

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## JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Tobacco Workers International Union and Local 182, Tobacco Workers International Union[1] petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this case.

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[1]Hereinafter Tobacco Workers International Union will be referred to as the International; Local 182, Tobacco Workers International Union, will be referred to as the Local Union, and collectively the Petitioners will be referred to as the Unions.

## OPINIONS BELOW

The Opinion of the Court of Appeals (App. A, **infra** p. 19) is not yet officially reported and is unofficially reported at 12 FEP Cases 314. The Judgment of the District Court (App. B, **infra** p. 49) is officially unreported and is unofficially reported at 8 FEP Cases 778.

## JURISDICTION

The Judgment of the Court of Appeals was entered on February 23, 1976 and rehearing was denied on April 16, 1976. The jurisdiction of this Court is invoked under 28 USC §1254(1).

## QUESTIONS PRESENTED

(1) Whether Title VII is violated when the impediment to advancement of blacks is not the result of an "artificial barrier" proscribed by **Griggs**[1] but is because a stagnant economy in the tobacco industry and automation have kept all employees, black and white, in jobs they held a year before any charge of discrimination was filed.

(2) Whether an International Union can be held liable for violations of Title VII occurring in a bargaining unit represented solely by one of its affiliated local unions where the collective bargaining agreements then in effect are fair and neutral and the Title VII violations are the result of practices totally outside the control of the International Union.

(3) Whether an award of "front pay" (that is, pay for periods of time subsequent to the date of judgment) is permissible under Title VII when all employees are accorded the same opportunity by the Court's decree, without any barriers, for future promotions.

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[1]**Griggs vs. Duke Power Co.**, 401 US 424 (1971).

## STATUTES INVOLVED

The following statutes are involved in this case (App. C, **infra** p. 105): Civil Rights Act of 1870, 42 USC §1981; Civil Rights Act of 1964, Section 703(a)-(c), 42 USC §2000e-2(a)-(c); Civil Rights Act of 1964, Section 703(h), 42 USC §2000e-2(h); Civil Rights Act of 1964, Section 703(j), 42 USC §2000e-2(j); Civil Rights Act of 1964, 42 USC §2000e-5(d), as amended, 42 USC §2000e-5(e).

## STATEMENT OF THE CASE

This is an employment discrimination case brought pursuant to 42 USC §1981 and Title VII of the Civil Rights Act of 1964, 42 USC §2000e, et seq. The lower courts held the promotional systems at the Virginia and Richmond plants of the American Tobacco Company in Richmond, Virginia[2] discriminated against blacks and females. Although the seniority system was found to be fair, the static employment situation in the tobacco industry and particularly at American locked blacks and females into lower paying jobs. In **Griggs,** this Court interpreted Title VII as requiring "the removal of artificial, arbitrary and unnecessary barriers to employment." 401 US at 431.

Thus, the precise question for review is whether the lack of promotional opportunities for **all** employees resulting from a stagnant economy and automation, not from a discriminatory seniority system, is an artificial barrier proscribed by Title VII. The second question presented for review concerns whether the International Union may be held liable for discrimination where it is not the representative of the bargaining unit of which the discriminatees are members.

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[2]Hereafter, American Tobacco Company, a division of American Brands, Inc. will be referred to as American.

## I.

The panel of the Court of Appeals found:

> "American operates three facilities in Richmond, Virginia. The 'Virginia branch' makes cigarettes; the 'Richmond branch' makes pipe tobacco; and the 'Richmond office' keeps accounts and records for both branches. Approximately 250 of the 1280 employees at both branches are black and in the Richmond office 13 of the 62 employees are black. In each branch, the prefabrication blends and prepares tobacco before sending it to the fabrication department, which manufactures the finished products. Workers in prefabrication generally earn less than those in fabrication, and most employees at the Richmond branch make less than those at the Virginia branch." (App. A, **infra** pp. 22-23.)

The Court further found that before 1963, overt segregation of employees by race occurred "with respect to job assignments, cafeterias, restrooms, lockers and plant entrances". The lower paying jobs in the prefabrication department were generally assigned to blacks while the higher paying ones in fabrication were assigned to white employees. Since each department had its own separate seniority roster, and since interdepartmental transfer could not be accomplished without forfeiture of seniority, the Court found the blacks were effectively locked into the lower paying jobs in prefabrication.

In September, 1963, departmental seniority was abolished but separate rosters at the Richmond and Virginia branches were maintained. Both lower courts found that until 1968 "a system of unwritten qualifications" effectively denied blacks "access to the higher paying jobs in the Virginia branch." The Richmond Branch, however, had no qualification restrictions on promotions.

In January, 1968, the qualification system was abolished and nearly all job vacancies were posted and the

senior employee in the plant who bid for the job obtained the promotion.

The Court of Appeals affirmed the District Court's finding relating to seniority:

> "The present system of posting and bidding adopted in 1968 is fair, although it needs, in the Court's view, further implementation. As indicated in the Findings of Fact, however, black and female employees in the Richmond branch and the Virginia branch have been locked in their jobs as a result of prior discriminatory practices. This is because of the static condition of the tobacco industry generally, and American in particular, and the advent of automation, both of which have limited opportunities for the upward movement of present employees and for new hiring." (App. B, **infra**, p. 54.)

Both courts also found "that the denial of transfer between the branches without retention of Company seniority perpetuates the effect of past discrimination" and the Court of Appeals ordered that certain employees be allowed to transfer from one branch to another on the basis of Company seniority. This finding was made despite the absence of any findings that blacks or females were ever prohibited from employment in either of the branches or that the lack of Company seniority frustrated blacks more than whites from transferring between branches.

## II.

In finding American and the Unions liable for race and sex discrimination,[3] the District Court, with the panel's approval, specifically held that the International Union was liable because one of its officers acted as an advisor

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[3]The panel dismissed the Complaint alleging sex discrimination against the two Unions because the EEOC had failed to attempt conciliation with the Unions prior to filing the action. This aspect of the panel's decision, therefore, has not been challenged here.

to the Local Union during negotiations and, pursuant to the International Union Constitution, the International Union General President had a right of approval of any proposed collective bargaining agreement.

Both lower courts dismissed as irrelevant the uncontradicted evidence that the International Union's General President did not in fact approve any collective bargaining agreement entered into by the Local Union and that, by the very terms of the Agreement, the International Union was not a party thereto. Additionally, both Courts ignored the fact that only the Local Union is certified by the National Labor Relations Board as the bargaining agent for American's production employees at the Richmond and Virginia Branches. Both of the lower courts also disregarded other relevant provisions of the Constitution of the International Union, specifically Section 28 of Article E thereof which provides that the International Union "assumes no responsibility for any agreement to which it is not an actual party".

In short, both lower courts impliedly rejected this Court's holding regarding the liability of an international union for acts of its local union affiliates in the **Coronado Coal Co.** cases.[4]

Furthermore, holding the International Union liable here violates the exclusivity principle of Section 9(a) of the Labor-Management Relations Act, 29 USC §159(a), that the recognized or certified bargaining agent selected by a majority of employees (here, the Local Union), and only that agent, may bargain on behalf of those employees.

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[4]**United Mine Workers vs. Coronado Coal Company**, 259 US 344 (1922); **Coronado Coal Company vs. United Mine Workers**, 268 US 295 (1925).

III.

The District Court ordered "immediate company-wide posting and bidding on each non-supervisory job in the Richmond Branch and Virginia Branch, with no qualification except seniority and a willingness to learn the job," with exceptions for a small number of jobs, and ordered an elaborate system for implementing this posting and bidding.

The Court of Appeals, however, rejected this "bumping" remedy and instead ordered front pay:

> "This compensation [back pay] should be supplemented by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position. [Citing two District Court cases.] Alternatively, the court may exercise continuing jurisdiction over the case and make periodic back pay awards until the workers are promoted to the jobs their seniority and qualifications merit. Or perhaps counsel and the court can devise some other convenient method of taking all the effects of past discrimination into account." (Footnote omitted.)

## REASONS FOR GRANTING THE WRIT

I.

When the Civil Rights Act of 1964 was enacted, this country was in the midst of an economic revival. Concern over wage earners competing for jobs was minimal. "Great Society" legislation, by its very terms, was designed to achieve equality in an economy which was ever-expanding and bursting at the seams with new opportunities, challenges and solvable problems.

The questions raised here deal with the application of Title VII to an economy tempered by the realism of a

recession, in an industry which was not expanding, where wage earners compete not so much for promotions but for any available job. In January, 1968, a complete plant-wide seniority system was instituted, without any qualifications, for the vast majority of jobs at American. Such seniority systems have been held to be "bona fide" under Section 703(h) of the Act, and therefore, lawful. **Local 189, Papermakers vs. United States,** 416 F. 2d 980 (5th Cir. 1969), cert. denied 397 US 919 (1970); **Waters vs. Wisconsin Steel Works,** 502 F. 2d 1309 (7th Cir. 1974), cert. denied ____US____ (1976); **EEOC vs. Detroit Edison Co.,** 515 F. 2d 301 (6th Cir. 1975). Specifically, the Seventh Circuit in **Waters** held:

> "Moreover, an employment seniority system is properly distinguished from job or department seniority systems for purposes of Title VII. Under the latter, continuing restrictions on transfer and promotion create unearned or artificial expectations or preference in favor of white workers when compared with black incumbents having an equal or greater length of service. Under the employment seniority system, there is equal recognition of employment seniority which preserves only the earned expectation of long-service employees.
>
> "Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the 'last hired, first fired' principle, does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences. **Griggs v. Duke Power Co.,** 401 US 424, 430-33 (1971)." 502 F. 2d at 1320.

The promotional system described as lawful under Title VII by the Fifth, Sixth and Seventh Circuits was

instituted at American in January, 1968, fully eleven months before any charge of discrimination was filed with the Equal Employment Opportunity Commission.

Both the District Court and the Fourth Circuit here found the promotional system essentially fair but nevertheless held that continuing discrimination occurred because blacks and females had not advanced to the higher paying positions. The cause of this lack of advancement and promotional opportunity was not an employment test or a departmental seniority system, as in **Papermakers,** or an unlawful weight restriction as in **Meadows vs. Ford Motor Co.,** 510 F. 2d 1220 (6th Cir. 1975), cert. denied ____US____ (1976). Instead, the cause was "the static condition of the tobacco industry generally and American in particular, and the advent of automation, both of which have limited opportunities for upward movement of present employees and for new hiring." (App. B, **infra** p. 54.)

We urge for the Court's consideration that automation and a stagnant economy are not artificial barriers to advancement proscribed by **Griggs.** The causes for the continuing disparity in income by race and sex and disproportionate concentration of blacks and females in some jobs, identified by the lower courts, are not within the control of either American or the Unions. Therefore, neither American nor the Unions should have been held liable for violations of Title VII.

In conflict with the decisions here is **Watkins vs. Steelworkers Local 2369,** 516 F. 2d 41 (5th Cir. 1975). In **Watkins,** only whites were hired at the plant until 1965. Between 1965 and 1969, a few blacks were hired each year. From 1969 until 1971 a substantial number of blacks were hired. Between 1971 and 1973, substantial layoffs occurred. Pursuant to the collective bargaining agree-

ment, layoffs and recalls were to be made in accordance with total plant-wide seniority. The "last hired, first fired" principle was utilized and resulted in a layoff of all employees hired after 1951 including a disproportionately large number of blacks. In fact, all but two blacks were laid off.

The Plaintiffs in **Watkins** were representatives of a class of black employees who had been laid off. They claimed that the "last hired, first fired" principle perpetuated the effects of past discrimination by eliminating almost the entire complement of black employees who had not been hired until after 1965 because of their race. The Fifth Circuit held that:

> "[R]egardless of an earlier history of employment discrimination, when present hiring practices are nondiscriminatory and have been for over ten years, an employer's use of a long-established seniority system for determining who will be laid-off, and who will be rehired, adopted without intent to discriminate, is not a violation of Title VII or §1981, even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination." 516 F. 2d at 44-45.

Unlike the courts below, the **Watkins** Court held that a Company and Union, though discriminating in the past, could not be held liable for violations of Title VII simply because a plant-wide seniority system had a greater adverse impact upon blacks than whites. The **Watkins** Court recognized that it was the economy and automation which resulted in the layoff, not any practice within the control of the Employer or the Union. The refusal of the Company to hire any blacks before 1965 and its con-

tinuing refusal to hire blacks in any significant numbers before 1969 (four years after the effective date of Title VII) is not itself sufficient to render the Company and the Union liable under Title VII because of layoffs occurring after 1969.

While recognizing the essential fairness of the plant-wide seniority system, the Courts below held American and the Unions liable under Title VII not because of employment practices within their control, but because of economic conditions adversely affecting new policies designed to give all employees an equal opportunity for promotion and advancement.

In sum, therefore, we urge that a fluctuating economy and automation are not the type of "artificial barriers" to advancement by blacks and females which this Court proscribed in **Griggs.** Rights under Title VII should not be made to depend upon the vagaries of our economy, or the efforts by any employer to achieve efficiency through automation. The **Watkins** Court recognized this policy and we commend its resolution of the problem to this Court.

## II.

In holding the International Union liable for the alleged discrimination committed by American and the Local Union, neither of the lower courts identified any provisions of the collective bargaining agreement as per se discriminatory. The International Union's liability was predicated simply upon two facts:

(1) The Constitution of the International Union provides that the General President of the International has a right to approve any collective bargaining agreement entered into by a local union;

(2) Although not a party to the contract, the International Union did have an advisor at contract negotiations who witnessed the execution of the collective bargaining agreement between American and Local 182.

Even if this were sufficient to establish an agency relationship (which under decisions of this Court it is not), nevertheless, in order to establish liability, there must have been a finding that **some provision of the collective bargaining agreement was per se discriminatory.** There were no findings in this regard. To the contrary, the provisions of the collective bargaining agreement were found to be "fair".

The finding of liability against the International was made even though the Local Union was the bargaining agent for American's employees, not the International. The right of approval of the collective bargaining agreement contained in the International Union's Constitution was never in fact carried out, as no approval was ever sought or obtained. Focusing on one section of the International's Constitution, both of the lower courts disregarded Section 28 of Article E of the Constitution which provides in relevant part:

> "It shall be the principal duty of the local unions to secure satisfactory collective bargaining in working agreements. . . The TWIU assumes no responsibility for any agreement to which it is not an actual party."

Further, the Constitution clarifies this intent behind the requirement that the General President may approve all collective bargaining agreements:

> "Such approval, however, is not to be construed as making the TWIU a party to any such agreement unless the TWIU actually signs and makes itself a party to such agreement. The TWIU assumes no responsibility for any agreement to which it is not an actual party."

The collective bargaining agreement clearly states that "the Company recognizes local union No. 182 of its Virginia Branch, Richmond Branch of the Tobacco Workers International Union as the sole and exclusive collective-bargaining agency. . ." In finding liability against the International, the District Court erroneously concluded:

> "Local 182 and the Tobacco Workers' International Union entered into collective bargaining agreements governing, inter alia, wage rates for employees under jurisdiction which became effective in 1954, 1956, 1958, 1960, 1962, 1965, 1968, 1971 and 1974, respectively. Unions have jurisdiction over employees at the Richmond Branch and the Virginia Branch but not the Richmond office."

Clearly, that finding was erroneous since the International was not a party to the contract and was not the representative of the employees at the Richmond and Virginia Branches.

The Court of Appeals held that:

> "The court [the district court] properly concluded that the International's approval of the bargaining agreement pursuant to this provision made it jointly responsible with the local. Cases dealing with an international union's exoneration of liability to an employer are inapposite where its duties to members of its local unions are at issue." (App. A, **infra** p. 36.)

The analysis of the District Court clearly breaks down inasmuch as the International is not the representative of these employees and is not a party to the collective bargaining agreement entered into on their behalf with American. The panel's affirmance of this holding is equally erroneous because, while focusing on one portion of the International's Constitution providing for approval of local collective bargaining agreements, the panel totally ignored other provisions of the International Union

Constitution which provide that the International is not a party to any agreement it does not sign as a party and the approval of the General President of local agreements is not intended to make the International a party or responsible for those agreements.

This Court, in **United Mine Workers vs. Coronado Coal Co., supra,** analyzed the relationship of an international union to a local union and the responsibility of an international unions for the acts of its local union, and concluded:

> "Here it is not a question of contract or of holding out an appearance of authority on which some third person acts. It is a mere question of actual agency, which the constitutions of the two bodies settled conclusively. If the International body had interfered, or if it had assumed liability by ratification, different questions would have arisen.
>
> * * *
>
> "But it is said that the district was doing the work of the International in carrying out its policies, and this circumstance makes the former an agent. We cannot agree to this in the face of a specific stipulation between them that in such a case, unless the International expressly assumed responsibility, the District must meet it alone." 259 US at 395.

This Court upheld and recognized the exculpatory provision in the Constitution of the Mine Workers. The lower courts here disregarded exculpatory provisions in the Constitution of the Tobacco Workers and thus departed from this Court's holding in **Coronado.**

It cannot be said that the exculpatory provision in the International's Constitution is intended to give the International the best of all worlds, i.e., control over the Local Unions without any responsibility or liability for their

acts. The Fourth Circuit in another Title VII case involving the Tobacco Workers held the International Union liable for Title VII violations, but there the International was actually the recognized bargaining agent for the employee and had actually entered into a collective bargaining agreement with the employer. **Robinson vs. Lorillard Corporation,** 444 F. 2d 791 (4th Cir. 1971), **cert. dismissed** 404 US 1006 (1971). The distinguishing facts in **Robinson** and the relationship between the parties there are found in the District Court's opinion at 318 F. Supp. 835 (M.D.N.C. 1970).

Plainly, the intent of these exculpatory provisions was to make the International responsible **only** when it in fact does represent the employees and enters into a contract with an employer on their behalf.

Most important, however, is the injury suffered by the exclusivity principle by the decision of the lower court.

The duty of fair representation owed by a labor organization to employees it represents in collective bargaining is an implied obligation arising out of the status granted labor organizations as "exclusive representative" pursuant to §9(a) of the Labor-Management Relations Act, 29 USC §159(a). The exclusivity principle has been recognized by this Court in **Virginia Railway Company vs. System Federation,** 300 US 515, 548 (1937), holding that the law "imposes the affirmative duty to treat only with the true representative and hence the negative duty to treat with no other." In **Plasti-Line, Inc. vs. NLRB,** 278 F. 2d 482, 486 (6th Cir. 1960), the Court stated that the law "imposes on the employer the positive duty to bargain with the representatives of the majority of its employees and not to bargain with any other." See also **U.S. Gypsum Co. vs. Steelworkers,** 384 F. 2d 38 (5th Cir. 1967), **cert. denied** 389 US 1042 (1968); **Auto Workers**

**vs. NLRB,** 394 F. 2d 757 (D.C. Cir. 1968), **cert. denied** 398 US 831 (1968). Very recently, in **Emporium Capwell Co. vs. WACO,** 420 US 50 (1975), this Court again emphasized that the collective agent chosen by the majority of the employees is the exclusive agent for dealing with the employer, even on issues relative to racial discrimination. Reaffirming the principles of **NLRB vs. Allis-Chalmers Manufacturing Co.,** 388 US 175 (1967), this Court quoted with approval the following from that case:

> "Thus, only the union may contract the employees' terms and conditions of employment, and provisions for processing a grievance. . . ." 420 US at 64.

As the exclusive bargaining agent for American's production employees, Local 182 is solely responsible for negotiating the agreement with American and enforcing agreements. Plainly, holding the International Union liable here, where it is **neither** the bargaining agent **nor** a party to the bargaining agreement, seriously undermines the exclusivity principle, and with it, the responsibility for fair representation.

Moreover, the lower courts' reliance on portions of the International Union's Constitution and disregard for other provisions is contrary to the teaching of **Coronado.** For these reasons, the finding of liability against the International Union should be reviewed by this Court.

## III.

The Fourth Circuit's award of front pay by the Court of Appeals contravenes the policy of Title VII and conflicts with the decisions of other circuits.

As pointed out above, the Court of Appeals below ordered the payment of back pay not only for the past but also for the future.

The Courts of Appeals have consistently, until the instant case, followed the "rightful place" theory in Title VII cases. This theory was discussed at length in **Local 189, Papermakers vs. United States, supra,** in which the Court explicitly held that Title VII "should be construed to prohibit the future awarding of vacant jobs on the basis of a seniority system that "locks in" prior racial classifications." 416 F. 2d at 988.

See **Pettway vs. American Cast Iron Pipe Co.,** 494 F. 2d 211, 258 (5th Cir. 1974).

Very recently, in **Sabala vs. Western Gillette, Inc.,** 516 F. 2d 1251, 1266 (1975), the Fifth Circuit noted that in **Pettway,** the court ordered the lower court to require affirmative steps to insure that discriminatees be given their "rightful place" but did not require back pay to the date they actual took their rightful place. Specifically, the termination date for back pay was to be the date of the Court's decree, or earlier.

The Decision of the Fourth Circuit below, therefore, directly conflicts with this series of holdings by the Fifth Circuit.

Likewise, it conflicts with holdings of the Sixth Circuit. In **Meadows vs. Ford Motor Co.,** 510 F. 2d 939, 948 (6th Cir. 1975), quoting with approval from the Fifth Circuit, the Court noted that the back pay "should compensate for economic losses suffered during the period of testing and before the implementation of this decision." See also **Head vs. Timken Roller Bearing Co.,** 486 F. 2d 870, 876-78 (6th Cir. 1973).

The courts, which unlike the courts below, have followed the "rightful place" theory of interpreting Title VII have followed the almost universally approved theory. It is the doctrine which is consistent with this

Court's holding in **Griggs** that Title VII requires the removal of artificial, arbitrary and unnecessary barriers to employment.

By awarding front pay, the Court of Appeals below has divurged from the holdings of other Circuits. In view of the large number of employment discrimination cases filed in recent years and the magnitude of many of those cases, we respectfully submit that the question of the propriety of front pay as a remedy should be resolved by this Court.

## CONCLUSION

For the reasons stated above, it is respectfully submitted that the writ should be granted.

Respectfully submitted,

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# APPENDIX A

# United States Court of Appeals
## FOR THE FOURTH CIRCUIT

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**No. 75-1259**

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JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH, and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated, - - - - - - - - - - - - - - Appellees,

-v-

THE AMERICAN TOBACCO COMPANY, a Division of American Brands, Incorporated, - - - Appellant.

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**No. 75-1260**

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JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH, and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated, - - - - - - - - - - - - - - Appellees,

-v-

Tobacco Workers' International Union, an unincorporated association; Local 182, Tobacco Workers' International Union, an unincorporated association, - - - - - - - - - - - - - - - - - - Appellants.

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**No. 75-1261**

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JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH, and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated, - - - - - - - - - - - - - - Appellants,

-v-

THE AMERICAN TOBACCO COMPANY, a Division of American Brands, Incorporated; Tobacco Workers' International Union,

an unincorporated association;
Local 182, Tobacco Workers' International
Union, an unincorporated association, - - - - - Appellees.

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**No. 75-1262**

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EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, - - - - - - - - - - - - - - - - Appellee,

-v-

Local 182, Tobacco Workers'
International Union (AFL-CIO), - - - - - - - - Appellant.

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**No. 75-1263**

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EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, - - - - - - - - - - - - - - - - Appellee,

-v-

AMERICAN BRANDS, INC., d/b/a
American Tobacco Company, Inc., - - - - - - - - Appellant.

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Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Albert V. Bryan, Jr., District Judge.

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(Argued May 7, 1975. Decided Feb. 23, 1976)

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Before WINTER, BUTZNER, and WIDENER, Circuit Judges.

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Henry L. Marsh, III; (S. W. Tucker; John W. Scott, Jr.; Randall G. Johnson; Hill, Tucker and Marsh; Jack Greenberg; Elaine R. Jones; Barry L. Goldstein; and Morris J. Baller on brief) for John Patterson, et al.; Henry T. Wickham (John F. Kay, Jr.; Kenneth V. Farino; Mays, Valentine, Davenport and Moore; Chadbourne, Parke, Whiteside and Wolff; Paul G. Pennoyer, Jr.; Arnold Henson; Bernard W. McCarthy; and Bernard J. Dushman on brief) for The American Tobacco Company and American Brands, Incorporated;

Herbert L. Segal (Irwin H. Cutler, Jr.; Walter Lapp Sales; Segal, Isenberg, Sales and Stewart; Jay J. Levit; Stallard and Levit; and James F. Carroll on brief for Tobacco Workers' International Union and Local 182);

Margaret C. Poles, Attorney, Equal Employment Opportunity Commission, (Julia P. Cooper, General Counsel; Joseph T. Eddins, Associate General Counsel; and Beatrice Rosenberg and Charles L. Reischel, Attorneys, on brief) for the Equal Employment Opportunity Commission.

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BUTZNER, Circuit Judge:

These appeals and cross appeals question certain provisions of a judgment entered in consolidated actions brought by the Equal Employment Opportunity Commission and several black employees of the American Tobacco Co. against the company, the Tobacco Workers International Union, and its Local 182. The case concerns the application of Title VII of the Civil Rights Act of 1964 [42 U.S.C. §2000e et seq.] and 42 U.S.C. §1981 to redress race and sex discrimination in working conditions.[1] Following is a summary of the district court's decision and our disposition of the assignments of error:

I. The district court defined the class of black employees as those, whether currently employed or not, who worked on or after July 2, 1965, the date Title VII became effective. It found no discrimination in hiring but ruled that the company and the labor organizations had engaged in unlawful employment practices by racial discrimination in the promotion of employees. It ordered American to institute company-wide seniority, eliminate certain lines of progression from lower to higher paying jobs, post definite job descriptions, grant back pay, and adjust pensions and profit sharing plans in amounts to be determined at a subsequent hearing. The court also ordered that white incumbents be bumped from jobs for which senior black employees were qualified.

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[1] 42 U.S.C. §2000e2 prohibits both employers and labor organizations from engaging in employment practices that discriminate on the bass of race or sex.

42 U.S.C. §1981 assures all persons the same right to make and enforce contracts as is enjoyed by white citizens.

Neither party has assigned error to the court's finding of no discrimination in hiring. We find no error in the designation of the class. We affirm the finding of discrimination in promotions and approve the relief ordered by the court, except for provisions of the judgment dealing with company-wide seniority and bumping.

II. The district court ruled that the EEOC was empowered to bring suit to eliminate discrimination against women, although the initial charge dealt only with discrimination against men. It defined the class of aggrieved women in terms similar to those used to describe the class of black employees. The court found discrimination in promotions but not in hiring, and it ordered relief similar to that afforded black employees.

On these issues we affirm the district court, modifying only its grant of relief.

III. The district court found discrimination in the selection of supervisors and ordered the company to prepare written job descriptions and objective criteria for appointments. It also ordered preferential hiring of blacks and women to fill supervisory vacancies.

We affirm these aspects of the court's judgment except for those dealing with preferential hiring.

IV. The district court held that the actions were timely filed, that the statute of limitations for an action brought under §1981 is five years, and that the statute is not tolled by filing a charge with the EEOC. It also held that back pay for discrimination against women should accrue from two years before the charge was filed.

Except for the application of the five-year statute of limitations and the accrual of liability for the women's back pay, we affirm these rulings. The proper limitation, we hold, is two years, and the accrual date for back pay must be reexamined in light of EEOC v. General Electric Co., _____ F. 2d _____, No. 74-1974 (4th Cir. 1975), which was decided after the district court wrote its opinion.

## I

American operates three facilities in Richmond, Virginia. The "Virginia Branch" makes cigarettes; the "Richmond

Branch" makes pipe tobacco; and the "Richmond Office" keeps accounts and records for both branches. Approximately 250 of the 1,280 employees at both branches are black, and in the Richmond office 13 of the 62 employees are black. In each branch the prefabrication department blends and prepares tobacco before sending it to the fabrication department, which manufactures the finished products. Workers in prefabrication generally earn less than those in fabrication, and most employees at the Richmond branch make less than those at the Virginia branch.

Before 1963 the union and the company overtly segregated employees by race with respect to job assignments, cafeterias, restrooms, lockers, and plant entrances. White employees were represented by Local 182 of the Tobacco Workers International Union, while black employees were represented by Local 216. Blacks were generally assigned to positions in the prefabrication departments. The higher paying jobs in fabrication were largely reserved for white employees. Each department had its own seniority roster, on which promotions depended. Employees could not transfer from one department to another without forfeiting their seniority.

In September 1963 the black union was assimilated by the white Local 182 to comply with an executive order relating to the government's purchase of supplies. Simultaneously, the company abolished departmental seniority, but it continued to maintain separate rosters at the two branches. The 1963 changes did not eliminate racial discrimination from the company's promotion practices. The district court found that until 1968 the company utilized a system of unwritten qualifications which denied black employees access to the higher paying jobs at the Virginia branch. For certain positions an employee had to be familiar with the duties of the new job in the opinion of his supervisor. Also, he had to work a minimum number of hours on a temporary basis to qualify as an operator of a making or packing machine. Consequently, black employees not working in proximity to the higher paying jobs had limited opportunity to qualify, regardless of their seniority. Combined with static employment in the tobacco industry, this system allowed little advancement of black employees from jobs in prefabrication to those in fabrication. Indeed, from

1963 to 1968 there was an increase of only four blacks in the fabrication department at the Virginia branch.

The Richmond branch had no qualification restrictions on promotions. Instead, supervisors canvassed employees, seeking the senior worker willing to fill a vacancy. There were, however, no written job descriptions. This system provided slight opportunity for black employees to move from prefabrication to fabrication, and from 1963 to 1968, there was an increase of only six black employees in the latter department. As of 1968, only three of the 26 machine operators were black.

In January 1968 the company discontinued its qualifications system. Instead, it posted vacancies and promoted the senior employee who bid for the job. The district court found that this innovation was "facially fair and neutral" but ordered that it be implemented by posting written job descriptions. Furthermore, the district court found that access to certain jobs was barred to black employees by lines of progression and the maintenance of separate seniority rosters for each branch.

Although the company and the union have taken steps in recent years to correct some of the inequalities of the past, the lines of progression, the lack of definite written job descriptions, and barriers to transfer between the branches remain impediments to fair and neutral employment practices. Much must still be done to eradicate any taint of racial discrimination at the plant. The most recent figures available indicate that as of the end of 1973, more than 80 percent of all the employees in the Virginia branch's prefabrication department were black, while in the fabrication department only about 14 percent were black. At the Richmond branch, black employees' penetration into the fabrication department was greater, with blacks comprising more than 38 percent of the work force. But the lower paying prefabrication department remained almost completely segregated; 92 percent of its employees were black. These figures provide ample support for the district court's findings that "[t]raditionally, at both branches there have been more blacks in the Prefabrication department than whites, and more whites in the fabrication department than blacks."

The company emphasizes that from July 2, 1964, to March 1, 1974, 25 percent of all employees promoted and 20 percent

of those advanced to operate automatic machinery at the Virginia branch were black. Also, since the initiation in January 1968 of the posting and bidding procedure, 51.5 percent of the successful bidders have been black. These gross figures, however, include promotions in both prefabrication and fabrication departments, and, while laudable, they do not address the crucial issue of the case — the entry of black employees into the historically white fabrication department. Apart from the fact that many of these promotions were made after charges were filed with the EEOC, the company's reliance on the overall promotion rate in both departments misses the mark because blacks have always been promoted in the historically black prefabrication department. Moreover, as late as 1973, of the approximately 200 hourly-paid, non-craft job classifications at Virginia, 18 had never been held by whites and 10 had never been held by blacks. Even more rigid segregation characterized the Richmond branch; of the approximately 43 hourly-paid, non-craft job classifications, 21 had never been held by whites and nine had never been held by blacks.

We conclude, therefore, that the record amply supports the district court's finding that after the effective date of Title VII the company and the union discriminated in the promotional policies of their bargaining agreements and practices. Tested by familiar standards, the court's findings must be sustained.[2]

We next consider the assignments of error that challenge the relief ordered by the district court. The directive that definite job descriptions must be provided in order to implement a fair method of promotion was clearly warranted. **Cf.** Brown v. Gaston County Dyeing Machine Co., 457 F. 2d 1377 (4th Cir. 1972).

In those jobs that were filled according to lines of progression, an employee had to work in the first job before proceeding to the next, and so on up to the highest job in the line. Most of these jobs were in the fabrication departments. Since black employees had been largely excluded from the fabrication departments, they held few jobs in most of these lines

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[2]Federal Rule of Civil Procedure 52(a) provides in part that "[f]indings of fact [by the court] shall not be set aside unless clearly erroneous . . ."

and could not advance despite their seniority. In this respect, the lines of progression perpetuated the effects of past discrimination in a manner similar to the formerly segregated departmental seniority rosters. On the basis of its evaluation of conflicting expert testimony, the district court held that only three of the nine lines are justified by business necessity.[3] For the others, alternative means such as on-the-job training are available to provide competent workers.

Addressing the discrimination caused by lines of progression, we pointed out in Robinson v. Lorillard Corp., 444 F. 2d 791, 799 (4th Cir. 1971), that the vagaries of chance inherent in this promotion system might bar a qualified worker from advancement for years, although he could learn to perform the job competently in a relatively short time. To deal with such situations, we formulated the following standard for ascertaining whether a condition of employment was justified by business necessity:

> "[T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." 444 F. 2d at 798.

Measured by this test, the district court's elimination of the six lines of progression was correct.

The district court also ordered a single seniority roster for the Virginia and Richmond branches to enable employees in each branch to bid for posted jobs in the other. The order is designed to correct the present effect of past discrimination, which denied black employees entry into the higher paying jobs of the fabrication departments, particularly at the Virginia branch. For example, under the present method of job assignments, a black employee hired in 1955 at the Richmond

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[3]The three positions for which lines of progression can be maintained are adjuster, overhaul adjuster, and adjuster prefabrication.

branch prefabrication department has no realistic opportunity to secure a higher paying job in the formerly white Virginia fabrication department because he cannot transfer his company seniority to the Virginia branch. If he seeks a new job there, he must forfeit his seniority and start as a new hire.

The district court correctly found that the denial of transfer between the branches without retention of company seniority perpetuates the effect of past discrimination. We believe, however, that the relief ordered by the district judge is broader than necessary. Title VII does not require the company or the union to forego the benefits of separate, non-discriminatory seniority rosters. "Application of the Act normally involves two steps. First, identification of the employees who are victims of discrimination, and second, prescription of a remedy to correct the violation disclosed by the first step. The Act does not require the application of the remedy to employees who are not subject to discrimination." United States v. Chesapeake and Ohio Ry., 471 F. 2d 582, 593 (4th Cir. 1972). The only employees who suffered discrimination were blacks who could not obtain jobs in the fabrication departments because of their race. Consequently, they are the only employees who should be allowed to transfer under the posting and bidding system from one branch to the fabrication department in the other branch on the basis of their company seniority. Black employees need not be allowed to transfer with company seniority to jobs in prefabrication, because they were never barred from these jobs in the first place. Similarly, white employees seeking transfers are not entitled to utilize company seniority, because they were never barred from fabrication departments. Finally, no employee hired after the cessation of discrimination in job assignments need be allowed to transfer with seniority intact. **See e.g.,** Russell v. American Tobacco Company, ____ F. 2d ____, No. 74-1610 (4th Cir. 1975); Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

The company and the union assert that this case is distinguishable from departmental seniority cases like **Robinson** because the Richmond and Virginia branches are in different locations. They emphasize that the branches make different products, have different managements, hire separately, and

are some distance apart. For these reasons, they argue, the case falls within 42 U.S.C. §2000e-2(h), which provides that:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . ."

Noting that neither the Act nor the regulations define the statutory term "employees who work in different locations," we recently construed §2000e-2(h) in Russell v. American Tobacco Co., _____ F. 2d _____, No. 74-1650 (4th Cir. 1975). We pointed out that the labor market is the most important factor in determining whether a company's employees work in different locations. A company operating two or more of its plants with employees who are from the same geographic area and who are unskilled or possess the same skills can assign an applicant to an entry level position in either plant. Therefore, employees the company hired from the same labor market would not generally fall within the statutory class of "employees who work in different locations."

On the other hand, even though a company's plants are in the same city, as they are here, their proximity does not conclusively show that they are in the same location. If one plant requires labor possessing skills different from those of workers at another plant, the company cannot draw from the same labor market to man its plants. Under these circumstances, employees would work at different locations, even though they reside and work in the same geographic area.

American hires employees for both branches from the same labor market. The branches are only a few city blocks apart. There are entry level jobs at both places that require neither particular skills nor experience, and jobs in fabrication can be filled just as well by transferees as by persons hired off the street.

Other facts support the district court's finding that these plants are not in different locations. The same bargaining agreement covers employees at both plants, and the company

has contractually reserved the right to shift employees from one plant to the other without depriving them of seniority. The Richmond office, located in a building at the Virginia branch, serves both branches, and the Virginia branch ships the Richmond branch's products.

There is another reason why the exemption granted in §2000e-2(h) is not available to American. As we noted in **Russell, supra,** slip op. at 10, that section contains a proviso that restricts its application to situations where differences in the conditions of employment "are not the result of an intention to discriminate." Past intentional segregation that is perpetuated by a company's seniority system precludes it from claiming that its system is bona fide within the meaning of §2000e-2(h), Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971). Similarly, "where present differences in working conditions are remnants of past intentional discrimination, the proviso of §2000e-2(h) bars a company from defending its employment practices on the ground that its employees work in different locations." Russell v. American Tobacco Co., _____ F. 2d _____, _____, No. 74-1650 (4th Cir. 1975), slip op. at 11.

We therefore affirm the district court on this issue but note that on remand it should vacate the provision of its judgment requiring a single seniority roster for both branches. It should substitute an order allowing those black employees who formerly could not obtain jobs in the fabrication departments because of discrimination to utilize their company seniority to bid for such jobs in the fabrication department of either branch. Of course, an employee who transfers must have the capacity to perform the job after receiving a reasonable amount of training.

The company and the union also assign error to the part of the district court's order that allowed senior black and female employees to bump junior employees from preferred jobs. The court ordered immediate company-wide posting and bidding on each non-supervisory job in the Richmond and Virginia branches. The only qualifications for advancement were to be seniority and a willingness to learn the job. To facilitate the bidding, the court ordered that job descriptions be posted. It further provided that employees who were dis-

placed by senior black or female workers, and therefore had to move to lower paying jobs, must be paid as much as they were in their former jobs. The court explained the reason for this provision of its decree as follows:

> "The present system of posting and bidding adopted in 1968 is fair, although it needs, in the Court's view, further implementation. As indicated in the findings of fact, however, black and female employees in the Richmond Branch and the Virginia Branch have been locked in their jobs as a result of prior discriminatory practices. This is because of the static condition of the tobacco industry generally, and American in particular, and the advent of automation, both of which have limited opportunities for upward movement of present employees and for new hiring." (Appendix at 37-38.)

The court's description of the lack of employment opportunities is well supported by the evidence. No new employees were hired to fill jobs under jurisdiction of the union from September 12, 1955, through June 12, 1964, in the Richmond branch and May 12, 1966, in the Virginia branch. Employment in both branches decreased from 1953 to 1973 by approximately 1300 workers.

One of the early questions about the construction of Title VII was whether "present consequences of past discrimination [are] covered by the act." Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 510 (E.D. Va. 1968). The generally accepted answer is a qualified "yes": employers and unions using pre-Act discriminatory practices to bar employees from filling post-Act vacancies violate the Act. Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971); **Quarles, supra.** On the other hand, Title VII has not been construed to impose a duty to demote incumbents. In Local 189, United Papermakers and Paperworkers v. United States, 416 F. 2d 980 (5th Cir. 1969), the court rejected the contention that "allowing junior whites to continue in their jobs constitutes an act of discrimination." Judge Wisdom, writing for the court, said:

> "The Act should be construed to prohibit the **future awarding** of vacant jobs on the basis of a seniority system that 'locks in' prior racial classification. White incumbent workers should not be bumped out of their **present** positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation." 416 F. 2d at 988.

Every appellate court to whom the issue has been presented has accepted this interpretation.[4] Equally important, when Congress was considering the 1972 amendments to Title VII, it approvingly noted **Papermakers'** construction of the Act.[5]

These precedents cannot be satisfactorily distinguished on the ground that bumping would be required only when the proof discloses a static industry that has few vacancies. The difference between static and dynamic industries is not always readily ascertainable because employment opportunities fluctuate for many reasons over long and short periods. Requiring bumping for static industries while denying it in dynamic industries would introduce into the administration of the Act countless variables for which Congress has made no provision.

Since the Act should not be applied retroactively,[6] it is, of course, much easier to justify the retention of incumbents who obtained their positions before the effective date of the Act than the retention of those who were unlawfully preferred after this date. Nevertheless, neither Congress nor the EEOC nor the courts have drawn a distinction between pre-Act and post-Act incumbents. The reasons for applying the Act uniformly are largely pragmatic. The enactment of Title VII was the result of many concessions, including the unequivocal assertion by proponents of the legislation that it was not intended to be used to displace incumbent workers.[7] A primary goal

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[4]**E.g.,** EEOC v. Detroit Edison Co., 515 F. 2d 301 (6th Cir. 1975); United States v. N. L. Industries, Inc., 479 F. 2d 354 (8th Cir. 1973); United States v. Chesapeake & Ohio Ry., 471 F. 2d 582 (4th Cir. 1972); United States v. Bethlehem Steel Corp., 446 F. 2d 652 (2d Cir. 1971).

[5]The section-by-section analysis of the House bill states that "it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." Legislative History of Equal Employment Opportunity Act of 1972, Government Printing Office (1972) at 1844. **Papermakers,** of course, was a prominent part of that case law.

[6]This principle is established by the legislative history. Senators Clark and Case, two of the bill's sponsors, circulated an interpretative memorandum stating that Title VII's operation was "prospective and not retrospective . . . (T)he employer's obligation would be simply to fill future vacancies on a non-discriminatory basis." 110 Cong. Rec. 6992 (daily ed. April 8, 1964), quoted in Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968).

[7]The Clark-Case memorandum, note 6 **supra,** states that an employer "would not be obliged—or, indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier." 110 Cong. Rec. 6992 (daily ed. April 8, 1964).

of Title VII is to induce voluntary compliance by employers and unions. Section 2000e-5; **see** EEOC v. Hickey-Mitchell Co., 507 F. 2d 944, 948 (8th Cir. 1974). Demoting employees, especially those who are not responsible for wrongdoing, undoubtedly would encounter more resistance than deferring their future expectancies. As this case illustrates, bumping is an unsettling process. Its domino effect adversely affects employees who have done no wrong and who, indeed, may have been the victims of discrimination.[8]

The effects of bumping are exacerbated by another aspect of Title VII. The Act does not provide a definitive catalogue of unlawful employment practices. Congress placed this responsibility on the EEOC and, ultimately, the courts. It soon became obvious that overt discrimination is not the only obstacle to equal employment opportunity.[9] As a result of litigation, many "practices, procedures, or tests neutral on their face, and even neutral in terms of intent" have been exposed as discriminatory and condemned. **See** Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971); United States v. Dillon Supply Co., 429 F. 2d 800, 804 (4th Cir. 1970). There is no reason to suppose that this process will soon abate. Bumping could mean that employers and workers would likely have their businesses and their working lives rearranged by court decrees from time to time, as various unlawful employment practices are identified. **See generally** Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv. L. Rev. 1260, 127-75 (1967).

Finally, although Congress did not intend the Act to be used as a vehicle for displacing incumbents, it did not leave the victims of discrimination without a remedy. Section 2000e-5(g) expressly authorizes a district court to award them back pay. While an employee who has been unlawfully denied a promo-

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[8]As part of its compliance with the district court's decree, American conducted a canvass of its employees to determine the effect of bumping. The results of that survey are contained in a report filed with this court to supplement the record. The report showed that 40 employees requested jobs to which their plant-wide seniority would entitle them. One of these has already obtained the job he requested. The others would bump eight white male employees and 31 minority employees out of the jobs they now occupy. We stayed the provision of the decree that required bumping pending this appeal.

[9]**See generally** Introduction, The Second Decade of Title VII: Refinement of the Remedies, 16 Wm. & Mary L. Rev. 433, 436-37 (1975).

tion must await a vacancy before advancing, he need not prove that a vacancy exists in order to qualify for back pay. Hairston v. McLean Trucking Co., 520 F. 2d 226 (4th Cir. 1975); Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971).

In Albemarle Paper Co. v. Moody, 422 U.S. 405, 408 (1975), the Court explained the standards a district court should follow in awarding back pay to employees who "have lost the opportunity to earn wages because an employer has engaged in an unlawful discriminatory employment practice." The Court said that the back pay provision must be applied in a manner that is "consonant with the twin statutory objectives" of "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421.

To satisfy these objectives, back pay must be allowed an employee from the time he is unlawfully denied a promotion, subject to the applicable statute of limitations, until he actually receives it. Some employees who have been victims of discrimination will be unable to move immediately into jobs to which their seniority and ability entitle them. The back pay award should be fashioned to compensate them until they can obtain a job commensurate with their status. This may be accomplished by allowing back pay for a period commencing at the time the employee was unlawfully denied a position until the date of judgment, subject to the applicable statute of limitations. This compensation should be supplemented by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position. **See** Bush v. Lone Star Steel Co., 373 F. Supp. 526, 538 (E.D. Tex. 1974); United States v. United States Steel Corp., 371 F. Supp. 1045, 1060 n. 38 (N.D. Ala. 1973).[10] Alternatively, the court may exercise continuing jurisdiction over the case and make periodic back pay awards until the workers are promoted to the jobs their seniority and qualifications merit. Or perhaps counsel and the court can devise some other con-

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[10]This measure of compensation is analogous to that awarded in an ordinary tort case, where compensation is assessed for one's loss of earnings whether the loss occurs before or after the judgment is entered. The analogy is apt because a statutory action attacking racial discrimination is fundamentally for the redress of a tort. **See** Curtis v. Loether, 415 U.S. 189, 195 (1974).

venient method of taking all the effects of past discrimination into account. In any event, the compensation must include, as the district court properly noted, increments for pensions and profit sharing.

Compensatory pay and adjustment of benefits provide monetary relief for discrimination against minority employees but do not afford the satisfaction that comes from being promoted to a more responsible job. Nevertheless, such an intangible benefit does not justify injunctive relief mandating bumping. Weighed against a minority employee's sense of achievement are the harm that demotion will cause to incumbents who have done no wrong and the disruption of the company's business that bumping entails. The survey of employees referred to in footnote 8, **supra,** indicates that 39 minority employees are seeking jobs held by 8 white men and 31 other minority employees. This survey, however, does not prove that the employees seeking different jobs were motivated even in part by non-monetary factors, for it was conducted on the assumption that bumping was the only way they could receive better pay and fringe benefits. Since full monetary compensation and the removal of barriers to promotion provide adequate relief to minority employees without disruption to other employees and management, we conclude that neither Title VII nor its legislative history requires bumping in this case.

Relief under §1981 is limited to correcting racial discrimination. **See** Delavigne v. Delavigne, No. 75-2203, _____ F. 2d _____ (4th Cir. 1976); Willingham v. Macon Telegraph Publishing Co., 482 F. 2d 535, 537 n. 1 (5th Cir. 1973). But apart from this, Title VII and §1981 provide complementary remedies for employment discrimination, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975). Although the legislative history of Title VII cannot support a decision that bumping relief is unavailable under §1981, the pragmatic considerations we advance apply with equal force to the §1981 claim. Moreover, "in fashioning a substantive body of law under §1981 the courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under Title VII for direction." Waters v. Wisconsin Steel Works of International Harvester Co., 502 F. 2d 1309, 1316 (7th Cir. 1974). For these reasons, we hold that bumping relief is not available to American's black employees under §1981.

On remand, therefore, the district court should modify its decree to eliminate bumping, but it should take steps to assure that back pay will be computed to include compensation for the entire time that a minority employee is denied a promotion for which he or she is qualified by seniority and ability.

We affirm the district court's award of relief against both the local and the International, except as noted in Part II. The local acquiesced without protest in the lines of progression. Not until 1968 did it negotiate for the removal of the qualification requirements for promotion. In 1968, 1971, and 1974, it proposed a company-wide seniority system that would have allowed transfers between branches. When the company declined, the union settled for assurances of indemnity that would protect its treasury against the claims of its members.

A union may not bargain away minority employees' rights to equal treatment, **see** Robinson v. Lorillard Corp., 444 F. 2d 791, 799 (4th Cir. 1971), and, indeed, it must "negotiate actively for nondiscriminatory treatment" of its minority workers. Macklin v. Spector Freight Systems, Inc., 478 F. 2d 979, 989 (D.C. Cir. 1973); **see also** United States v. N. L. Industries, Inc., 479 F. 2d 354, 379 (8th Cir. 1973). The Supreme Court has recently emphasized the duty a union owes to its minority members by pointing out that one of the purposes of a back pay award is to spur unions, as well as employers, to evaluate employment practices and eliminate unlawful discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975). Tested by these principles, the district court's imposition of liability on both the local and the International was warranted by the law and the facts.

Nor can we accept the International's argument that it should not be held liable because it was not responsible for the contracts negotiated by the local. The evidence disclosed that a vice president of the International acted as an "advisor" to the local, playing an active role as the president's deputy in the 1971 and 1974 negotiations for bargaining agreements. Moreover the constitution of the International provides:

> "It shall be the principal duty of the Local Union to secure satisfactory collective bargaining and working agreements showing an adequate minimum wage and fair working conditions for workers who have become affiliated with the TWIU, provided, however, that no collective

> bargaining and working agreement shall be consummated until first submitted to the general president who may approve or reject any proposed agreement, and no such agreement can be executed without the approval of the general president or his deputy."

The district court was not obliged to accept representations of the vice president that contradicted the plain meaning of this provision. The court properly concluded that the International's approval of the bargaining agreement pursuant to this provision made it jointly responsible with the local. Cases dealing with an international union's exoneration of liability to an employer are inapposite where its duties to members of its local unions are at issue.

## II

The EEOC's complaint contains allegations of discrimination against women employees. The company contends that the commission lacked authority to press this claim because no female employee filed a charge. On the contrary, the company points out, the only charge of sex discrimination was filed by a male employee. The district court overruled the company's motion to dismiss this aspect of the case, holding that the commission could institute the suit if its investigation of the male employee's complaint disclosed discrimination against women.

We affirm the district court. We recently decided this issue adversely to the company's position in EEOC v. General Electric Co., _____ F. 2d _____, No. 74-1974 (4th Cir. 1975). The company's argument does not persuade us to depart from the conclusions reached in that case.[11]

On the merits of the claim of sex discrimination, we uphold the district court's finding of liability. Because the company's discrimination against women bears many similarities to its discrimination against black employees, we need not recite the evidence in detail. It is sufficient to note that for many years the company overtly segregated jobs by sex, discriminating against women, as the district court found, "with respect to wage structure, departments, seniority and hiring." Even after these practices were nominally eliminated in 1963, their dis-

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[11]See Part IV **infra** for a discussion of the statute of limitations with respect to this issue.

criminatory effect was perpetuated by lack of definite job descriptions, lines of progression, and obstacles to transfers. The court found that as recently as 1973, 23 of the approximately 200 non-craft, hourly-paid jobs at the Virginia branch had not been held by women, and six had not been held by men. At the Richmond branch, 32 of the 43 non-craft, hourly-paid jobs had not been held by women, and six had not been held by men. The company has not demonstrated that these segregated positions cannot be filled by persons of the opposite sex. The court also found that from 1967 through 1972 women had a lower mean income than men with comparable seniority.

Again, the district court's findings are supported by the evidence and cannot be set aside as clearly erroneous. The relief of the court afforded women is essentially the same as the relief it granted black employees. Accordingly, we approve the relief for women employees, subject, however, to the same modifications of the court's decree that we mentioned in Part I. This relief, however, can be granted only against the company. The complaint against the union for sex discrimination must be dismissed for reasons we will next discuss.

The commission's complaint names the company and Local 182 as defendants. The commission acknowledged that it had not attempted to conciliate the charges with the union before filing suit. While the suit was pending, it made an offer to conciliate, which the union accepted. In the course of discussion with the union, however, the commission's representative conceded that he had no authority to settle the suit. Understandably, the conciliation efforts were unsuccessful. The district court, viewing the lapse as technical, held that the belated offer to conciliate and its acceptance substantially complied with the Act.

The Act requires, however, that after receiving a charge and before bringing a suit the commission must take four steps: serve the charge on the employer and labor organization, investigate the charge, determine that reasonable cause exists to believe the charge is true, and endeavor to eliminate alleged unlawful employment practices "by informal methods of conference, conciliation, and persuasion."[12] The 1972 amendments

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[12]42 U.S.C. §2000e-5(b).

to Title VII empowered the commission to sue if it is unable to secure an acceptable conciliation agreement.[13] This provision of the Act has been construed to create an express condition on the commission's power to sue. Consequently, a suit brought by the commission before attempting conciliation is premature. EEOC v. Hickey-Mitchell Co., 507 F. 2d 944, 947-48 (8th Cir. 1974); EEOC v. E. I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1333-34 (D. Del. 1974); EEOC v. Westvaco Corp., 372 F. Supp. 985, 991-93 (D. Md. 1974).[14]

We recently emphasized that the commission's statutory duty to attempt conciliation is among its most essential functions.[15] It is particularly important for the commission to attempt conciliation with a union when investigation discloses that provisions of a bargaining agreement concerning seniority and job assignments are causing the alleged unfair employment practices. Then the employees who enjoy majority status are frequently more directly affected than their employer by changes that will advance minority employees. In such cases, the success of conciliation often hinges on the union's response.

We do not rule out the possibility that exceptional circumstances may excuse a failure to attempt conciliation, but that is not the case here. The union's willingness to negotiate even after suit was brought tends to negate any suggestion that timely conciliation of the sex discrimination charges would have been unsuccessful. When it became apparent that the commission's representative lacked authority to settle the case, the possibility of conciliation was dealt a severe blow by the very circumstances Congress sought to avoid—commencement of a civil action before attempting conciliation. Accordingly, we conclude that the district court should have dismissed the part of the commission's complaint which alleges that Local 182 caused the company to discriminate unlawfully on the basis of sex.

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[13]42 U.S.C. §2000e-5(f) (1).

[14]We have held that the commission's failure to attempt conciliation is not a jurisdictional bar to an employee's action, because the employee cannot be charged with the commission's failure to execute its statutory duties. Russell v. American Tobacco Co., _____ F. 2d _____, _____, No. 74-1650 (4th Cir. 1975); Johnson v. Seaboard Air Line R.R., 405 F. 2d 645 (4th Cir. 1968). These cases, however, are inapposite where the commission's power to sue is in question.

[15]EEOC v. Raymond Metal Products Co., _____ F. 2d _____, _____, No. 75-1007 (4th Cir. 1976).

## III

The district court also found that the company had engaged in race and sex discrimination in appointing supervisors. The evidence supports this finding. At both the Richmond and Virginia branches, the entry level position for supervisory personnel is assistant foreman. The company fills about 34 percent of the vacancies in this position by promoting hourly employees; it fills the balance by hiring new applicants. With no formal, objective, written standards for appointment, the company relies in part on recommendations from the union, which also lacks objective standards. Until 1963 the company appointed only white males to supervisory posts, and the enactment of Title VII failed to effect any immediate change in this policy. At the Richmond branch, the first black supervisor was appointed in 1966 and the second in 1971. As of June 1, 1973, there were only three, constituting 9.6 percent of the supervisory force of 31. In 1967 the company named its first female supervisor at the Richmond branch. By 1973 two (6 percent) of the 31 supervisors were women. At the Virginia branch, a black employee was promoted to assistant foreman in 1963. In the next decade four more were appointed, so that by 1973 7.24 percent of the 69 supervisors were black. The first female was not appointed as a supervisor at this branch until 1972. Two more were appointed by June 1, 1973.

Before the trial of the case, neither a black employee nor a woman had ever been appointed to a supervisory position at the Richmond office. The court noted, however, that a vacancy existed, and the company proffered additional evidence that as of November 1, 1974, the Richmond office had one black supervisor and one white female supervisor on a staff of eight.

The district court enjoined the company from "implementing, maintaining, or giving effect to any criteria utilized for the selection of supervisory personnel which is designed to or has the effect of discriminating against black or female candidates for supervisory positions." It ordered the company to post job descriptions for these positions and to devise objective criteria for selecting new appointees. The propriety of these provisions of the court's decree is well settled. **See** Brown v. Gaston County Dyeing Machine Co., 457 F. 2d 1377, 1383 (4th Cir. 1972); Rowe v. General Motors Corp., 457 F. 2d 348, 358-59 (5th

Cir. 1972). We think, however, that on remand the court's decree should be enlarged to require the union to publish objective criteria for making its recommendations for supervisory appointments.

Finally, the district court ordered that vacancies in the assistant foreman, foreman, and office supervisory positions must be filled with qualified blacks and women, except when none can be found, until the percentage of blacks and women equals the percentage of these classes of workers in the Richmond Standard Metropolitan Statistical Area (SMSA). The company's attack on this provision of the decree is two-pronged. First, it contends that Title VII condemns preferential hiring, especially when, as here, the preferences are absolute. It relies primarily on §703(j) of the Act, 42 U.S.C. §2000e-2(j), which provides in part:

> "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . [or] sex . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . [or] sex . . . employed . . . in comparison with the total number or percentage of persons of such race . . . [or] sex . . . in any community . . . or in the available work force in any community. . . ."

This section plainly bans the use of preferential hiring to change a company's racial imbalance that cannot be attributed to unlawful discrimination. In Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971), the Court said:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

Uniformly, however, Title VII has been construed to authorize district courts to grant preferential relief as a remedy for

unlawful discrimination. Rios v. Enterprise Association Steamfitters Local 638 of U.A., 501 F. 2d 622, 628-31 (2d Cir. 1974); United States v. N. L. Industries, Inc., 479 F. 2d 354, 377 (8th Cir. 1973); Southern Illinois Builders Association v. Ogilvie, 471 F. 2d 680, 683-86 (7th Cir. 1972); United States v. Ironworkers Local 86, 443 F. 2d 544. 552-53 (9th Cir. 1971); United States v. International Brotherhood of Electrical Workers, Local No. 38, 428 F. 2d 144, 149-51 (6th Cir. 1970); Local 53 of International Ass'n of Heat & Frost I. & A. Workers v. Vogler, 407 F. 2d 1047, 1053-54 (5th Cir. 1969). This construction of the Act is in harmony with other cases which authorize preferential relief from unlawful employment discrimination in situations where Title VII is not applicable. Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F. 2d 9, 16-18 (1st Cir. 1973); Carter v. Gallagher, 452 F. 2d 315, 330 (8th Cir. 1971); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F. 2d 159, 172, 176-77 (3d Cir. 1971). In all, eight circuits have approved some form of temporary preferential relief for discriminatry employment practices. **See** Sape, The Use of Numerical Quotas to Achieve Integration in Employment, 16 Wm. & Mary L. Rev. 481, 499 (1975). No court of appeals has ruled to the contrary, although there have been dissents.

We have not previously ruled on the issue, but in a case involving the Civil Rights Act of 1866 and the thirteenth and fourteenth amendments, we declined to impose quotas where the district court concluded that adequate relief could be obtained without their use. **See** Harper v. Kloster, 486 F. 2d 1134, 1136 (4th Cir. 1973). In view of the substantial precedent sanctioning preferential relief for unlawful discrimination, we reject the company's argument that Title VII forbids the remedy ordered by the district court. We recognize, however, that cases which approve such remedies caution that the necessity for preferential treatment should be carefully scrutinized and that such relief should be required only when there is a compelling need for it. **See** Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F. 2d 9, 17 (1st Cir. 1973). This brings us to the company's second reason for vacating the decree's provision for preferential appointment of supervisors.

The company argues that its appointment of black and female employees to supervisory positions already exceeds the

ration that preferential relief would require. Its argument rests on two premises. One, its conduct before the effective date of Title VII does not provide a proper base to measure its compliance with the Act; instead, it must be judged by the manner in which it filled vacancies after this date. Two, the district court erroneously considered the number of blacks and women in the Richmond SMSA workforce as a whole to ascertain a ratio of acceptable performance, instead of using only the blacks and women in the Richmond SMSA supervisory workforce.

We believe these premises are well founded. Title VII is not retroactive.[16] It does not provide a remedy for discrimination which occurred before it became effective in 1965. Robinson v. Lorillard Corp., 444 F. 2d 791, 795 (4th Cir. 1971). At the Virginia branch 51 of the supervisors were appointed before Title VII prohibited discrimination in their selection. They should not be counted in determining whether preferential hiring is required now. Between 1965 and 1973 the company appointed 18 assistant foremen, the entry level position for supervisors. Of that number, five (27.5 percent) were black and three (16.6 percent) were women. At the Richmond branch, 22 of the supervisors were appointed before Title VII became effective and nine afterwards. Of the nine, three (33.3 percent) were black and two (22 percent) were women. At the Richmond office, the evidence is not as clear. It has six entry level supervisory positions, which at the date of trial were filled by five white males with one vacancy. The district court found that four of the six positions had been filled after 1965. Subsequently, the company proffered evidence that it has promoted one black employee and one female to supervisory positions, constituting for each classification 16.6 percent of the appointments since 1965.[17]

The record discloses that 6.8 percent of the blacks and 1.5 percent of the women in the Richmond SMSA are placed in a

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[16]The legislative history of Title VII indicates that it is not intended to be retroactive. **See** note 6 **supra.**

[17]The district court declined to reopen the record to consider this proffer. Under the ratio that the court used for comparative purposes, the evidence had but slight probative effect. Its import, however, is magnified by acceptance of the company's premise that its performance since 1965 is what must be examined in determining whether it has violated the Act. On remand the court should reexamine the situation at the Richmond office.

category that includes supervisory personnel. Those percentages furnish a more realistic measure of the company's conduct than the gross percentage of blacks and women in the whole workforce, including unskilled labor. **See** Harper v. Mayor, 359 F. Supp. 1187, 1193 n. 5 (D. Md.), **aff'd sub nom.** Harper v. Kloster, 486 F. 2d 1134 (4th Cir. 1973).

The fact that the company's appointments since 1965 exceed the ratio of qualified blacks and women in the workforce does not exonerate the company for the violations of the Act which the district court found. The tardy appointments of blacks and women to supervisory positions long after the passage of Title VII and the present lack of published job descriptions and objective selection procedures fully justify the injunctive relief the district court ordered. We believe, however, that the rate at which the company currently appoints blacks and women to supervisory positions is sufficient to show that there is no compelling need for the imposition of a quota.[18] **But see** Karst & Horowitz, Affirmative Action and Equal Protection, 60 Va. L. Rev. 955 (1974).

## IV

The company contends that the charge filed with the EEOC on January 3, 1969, was not timely because there were no discriminatory practices at either branch after January 15, 1968. It argues that for this reason the action should be dismissed for failure to meet the jurisdictional requirement of a timely charge.[19] The district court, however, found that the discrimination was of a continuing nature and properly held that the charge was timely Williams v. Norfolk & Western Ry., _____ F. 2d _____, No. 74-1549 (4th Cir. 1975); Macklin v. Spector Freight Systems, Inc., 478 F. 2d 979, 994 (D.C. Cir. 1973); **see** Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 567 n. 13 (1975) (dictum).

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[18]We do not mean to suggest that the company may use its percentage of black and female supervisors as a defense to future charges of discrimination against blacks and women. It must consider each application on its merits. If the company discriminates against a black or a woman, it can be called to account for violating Title VII, regardless of the percentage of blacks and women among its supervisors.

[19]Before the 1972 amendments to Title VII, a charge had to be filed with the EEOC within 90 days of the alleged unlawful employment practice. 42 U.S.C. §2000e-5(d) (1964). In 1972, this period was changed to 180 days. 42 U.S.C. §2000e-5(e).

The district court ruled that the filing of the charge in 1969 did not toll the statute of limitations for the §1981 action which was filed in 1973. The Supreme Court recently confirmed the district court's correct understanding of the law. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

The district court applied the Virginia five-year statute of limitations to the §1981 action. We have ruled, however, that the state's two-year statute applies to §1982 actions. Allen v. Gifford, 462 F. 2d 615 (4th Cir. 1972). Both §1981 and §1982 were enacted to redress infringemnts of closely related civil rights. We conclude, therefore, that the same two-year statute should apply to §1981 actions. **Accord,** Revere v. Tidewater Telephone Co., No. 73-1390 (4th Cir., October 2, 1973) (unpublished opinion applying the two-year statute to a §1981 action); **cf.** Almond v. Kent, 459 F. 2d 200 (4th Cir. 1972). Accordingly, on remand, the two-year statute of limitations should be applied to the §1981 claim. Of course, the point has little practical significance in this case in view of the fact that the §1981 action was not tolled by the filing of the charge with the EEOC.

The district court ruled that back pay for sex discrimination should accrue from April 8, 1967, two years before the charge was filed with the EEOC. The two-year period mentioned by the district judge confirms with the statute.[20] However, this charge did not allege discrimination against women. Instead, this type of discrimination was initially disclosed by the EEOC's investigation.[21] Dealing with similar circumstances, we held in EEOC v. General Electric Co., _____ F. 2d_____, No. 74-1974, slip op. at 34-36 (4th Cir. 1975), that in the absence of countervailing equities a trial court should limit back pay to two years before the employer received notice of the results of the investigation. On remand the district court should reconsider its decree in light of this case.

The judgment is affirmed in part and modified in part, and the case is remanded for further proceedings consistent with this opinion.

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[20]42 U.S.C. §2000e-5(g).

[21]**See** Part II **supra.**

WIDENER, Circuit Judge, concurring and dissenting:

I concur in large part with the opinion of the court for the reasons stated in the opinion. I differ, however, in some respects, and as to those I respectfully dissent.

So far as the opinion is based on **EEOC v. General Electric Company,** No. 74-1974 (4th Cir. 1975), I dissent for the reasons set forth in my dissent in that case, our judgment in which is not yet final. I should say, however, that this case may be a somewhat closer one than **General Electric** because here, at least, sex discrimination was the subject of the EEOC complaint, while in **General Electric** it was not. This case points up the importance of requiring the EEOC to comply with its own regulations as well as the statute. The union here is excused from liability for discrimination on account of sex because the statute was not complied with. The reason especially emphasized and held is that ". . . a suit brought by the commission before attempting conciliation is premature," p. 31, because ". . . the commission's statutory duty to attempt conciliation is among its most essential functions." p. 32. Despite the fact that both the company and the union were deprived of the first conciliation step as set forth in 29 CFR §1601.19a, as well as the statutory benefits of conciliation attempts, the company is held to liability, while the union is not, although the liability was caused by the collective bargaining agreement signed by both the company and the union. Thus, I dissent not only from the finding against the company, but also from the disparate treatment awarded the company and the union on facts which are indistinguishable.

While the subject of collective bargainiing agreements is at hand, I should say I have grave reservations about considering evidence in this type case of the respective positions taken by the company and the union in negotiations leading up to collective bargaining agreements when the agreement results in unlawful discrimination. This is tantamount to allowing a good faith defense disapproved by us in **Moody v. Albemarle Paper Company,** 474 F2 134 (4th Cir. 1973). (Modified on other grounds, 422 US 405 (1975).

The district court had only this to say about damages:

> "The formulation of the method of calculation and distribution of the back pay award and adjustment to the

> pension and profit-sharing plans will be complex—sufficiently so as to tax the ingenuity and good faith of counsel. In this regard counsel are directed to confer with a view to agreeing on a plan of calculation and distribution of the back pay award for submission to the Court—and, indeed, to explore the possibility of settling the monetary aspects of the case." App. p. 42.

With the opinion of the district court in mind, it is seen that the method of computing damages was not considered by that court and is not properly before this court, **McGowan v. Gillenwater,** 429 F2 586 (4th Cir. 1970), so the detailed discussion of that subject is a dictum. If the district court, in ascertaining damages, adopts standards with which either side is in disagreement, either is at perfect liberty to appeal the award. Taking up the matter now, and especially its treatment in detail, when the matter is so "complex" as to "tax the ingenuity and good faith of counsel," and upon no record, is too great a departure from what I conceive to be the proper rule of courts expressing opinions only with reference to existing controversies. There is no controversy at this time between the parties about this matter, and an expression of opinion I think beyond the legitimate function of an appellate court. I express no opinion as to the correctness of the dictum.

We hold that the imposition of quotas for supervisory positions is error because the "rate at which the company currently appoints blacks and women to supervisory positions is sufficient to show that there is no compelling need for the imposition of a quota," and, then, in note 18, explain that the maintenance of a quota is not a defense to a charge of racial or sexual discrimination. In view of our holding and note 18 just referred to, I think we go out of our way just earlier in the opinion to justify the imposition of quotas in hypothetical cases.

Since quotas themselves are the rankest kind of discrimination and their application, if valid in any context, requires exaggerated facts not present here, that general subject would be better left for another day.

Senator Clark, one of the sponsors of the statute and one of the Senate floor managers, filed, in Legislative History, 3014, in response to objections made by opponents of the legislation, a series of answers to the objections, among them the following (p. 3015):

"Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.

"Answer: Quotas are themselves discriminatory."

In view of the fact that the very existence of a quota is constitutionally suspect, the just quoted legislative interpretation of the statute, and our holding, such justification in hypothetical cases I think is out of place.

# APPENDIX B

**PATTERSON v. AMERICAN TOBACCO CO.**

**U.S. District Court,**

**Eastern District of Virginia**

PATTERSON, et al. v. THE AMERICAN TOBACCO COMPANY, TOBACCO WORKERS' INTERNATIONAL UNION, and LOCAL 182, TOBACCO WORKERS' INTERNATIONAL UNION; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. THE AMERICAN BRANDS, INC., doing business as THE AMERICAN TOBACCO COMPANY, and LOCAL 182, TOBACCO WORKERS' INTERNATIONAL UNION (AFL-CIO), Nos. 101-73-R and 104-73-R, September 25, 1974.

Henry L. Marsh, III, Richmond, Va., for plaintiffs in No. 101-R-73.

William A. Carey, General Counsel, William L. Robinson, Associate General Counsel, Isabelle R. Cappello, Assistant General Counsel, Ethel Oliveri, and C. Daniel Karnes, for plaintiff in No. 104-73-R.

Henry T. Wickham, Kenneth V. Farino, and John F. Kay, Richmond, Va., for defendant employer.

Jay J. Levit and James F. Carroll, Richmond, Va., for defendant unions.

**Full Text of Opinion**

ALBERT V. BRYAN, Jr., District Judge:—These actions, consolidated for trial, involve alleged sex and race discrimination in two plants and an administrative office of The American Tobacco Company (American) in Richmond, Virginia. Civil Action No. 101-73-R (Patterson) is brought pursuant to 42 U.S.C. §1981 and Title VII of the Civil Rights Act of 1964

(42 U.S.C. §2000e, et seq.)[1] as a private class action[2] seeking affirmative injunctive relief and back pay on the basis of past and continuing racial discrimination in employment practices, particularly with regard to seniority and job assignments resulting from the seniority.[3] Civil Action No. 104-73-R (EEOC) is also a Title VII action, but was brought by the Equal Employment Opportunity Commission (EEOC) pursuant to 42 U.S.C. §2000e-5(f)(1). It contains allegations similar to those in Patterson with regard to employment practices and in addition alleges discrimination in hiring on the basis of race and sex discrimination. The Tobacco Workers' International Union (the International), a defendant in the Patterson action, is not named in the EEOC action. Local No. 182 of the International (the Local) is named a defendant in both actions.

**[ISSUES LIMITED]**

The case was tried to the Court beginning July 15, 1974, limited to the issues of liability for back pay and injunctive relief. The issues as to the amount, method of calculation, and distribution of any back pay award are to be considered after resolution of the issues of liability and injunctive relief. The last of the post trial briefs was received on or about August 15, 1974.

For a more complete description of the parties and certain other facts, reference is made to Stipulation Number I, at-

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[1]The Patterson action was originally brought only pursuant to 42 U.S.C. §1981. Following receipt of a Notice of Right to Sue from the EEOC to certain named plaintiffs, the action, on March 12, 1973, was amended to include an allegation of violation of Title VII.

[2]The class has been defined as follows:

(1) All black persons, whether currently employed or retired, who were employees of the defendant company on or after July 2, 1964; and

(2) All black persons, whether currently employed or retired, who were employees of the defendant company on or after July 2, 1965, who were performing duties in jobs, the compensation for which was less than that for similarly situated white employees.

[3]On May 10, 1974, on plaintiffs' motion, an order was entered striking from the Amended Complaint in Patterson all allegations pertaining to discrimination in hiring on the basis of race. Since the trial of the case the plaintiffs in Patterson have filed, pursuant to Fed. R. Civ. P. 15th), a motion to amend the complaint to conform to evidence introduced at the trial on the subject of hiring on the basis of race. That subject was included in the complaint by the EEOC at the time of trial. Consequently, the subject, even without the amendment sought by the Patterson plaintiffs, will be considered in this opinion.

tached as Appendix I, which the Court adopts as part of its findings of fact.[4]

During and after trial, defendants renewed motions previously made for dismissal and summary judgment. These will be considered before reaching the merits of plaintiffs' allegations:

**A. The EEOC Action Was Not Timely Filed.**

This issue has now been decided, adversely to defendants, by EEOC v. Cleveland Mills Co., 8 FEP Cases 561, Civil No. 73-2298 (4th Cir., August 19, 1974).

**B. The Right of EEOC to Sue Terminates upon the Filing of Patterson and Vice Versa.**

The "problem of duplicitous actions" referred to in Cleveland Mills is really no problem here. In the first place, when the Patterson suit was originally filed, on March 2, 1973, it was not a Title VII action; it did not become one until March 12, 1973. The EEOC action was filed on March 5, 1973. Second, there are significant differences, as heretofore set forth, between the actions, the only duplication being on the issue of discrimination in promotional opportunities on the basis of race. Third, even if it were concluded that the plaintiffs in Patterson, instead of amending their complaint, should have intervened on this issue in the EEOC action, dismissal of either action would not be warranted. Here the consolidation of the actions has accomplished what intervention would have.

**C. The EEOC Has No Standing to Represent Females.**

American's position on standing, in essence, is that EEOC can only have that standing which the charging party, in this case Jenkins, would have had if he had brought a private action. Jenkins, a male, filed a charge with the EEOC alleging discrimination against males because of sex. EEOC in its complaint here charges discrimination against females because of sex. American says that because Jenkins could not bring a private action based on discrimination against females, neither can the EEOC. The Court does not agree. Such restriction on

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[4]Counsel for the defendant unions did not agree to Paragraphs 9, 10, 50 and 56 of the Stipulation; however, the Court finds that the statements of fact contained in those paragraphs are correct.

the adjudication of all the aspects of an issue such as sex discrimination runs counter to the liberal construction to which Title VII is entitled. This case is distinguishable from the cases which hold that where the charging party alleged only race discrimination before the EEOC, the EEOC cannot file a complaint alleging sex discrimination, although there is language in some of those cases which supports defendants' position.[5] It would be inconsistent with the remedial aims of Title VII to hold that once the issue of sex discrimination had been presented to the Commission, the Commission could only investigate discrimination against persons of the same gender as the person who made the charge. A proper investigation of that issue would almost necessarily involve inquiry into whether either sex was being discriminated against. Discovery of such discrimination without the ability to seek to alleviate it in accordance with 42 U.S.C. §2000e-5(f)(1) would subvert the purpose of that provision. Certainly discrimination against both sexes was within "the scope of the EEOC investigation which can be reasonably expected to grow out of the charge of discrimination." Sanchez v. Standard Brands, Inc., 431 F. 2d 455, 466, 2 FEP Cases 788, 796 (5th Cir. 1970).

**D. All Claims Are Barred by the Virginia Statute of Limitations, Va. Code Ann. §8-24.**

The cited Virginia statute does not mention 42 U.S.C. §1981. It does mention 42 U.S.C. §1983. Actions under the latter, according to the Virginia statute, must be brought within one year. Actions for back pay, such as the instant one, would clearly survive, and were this action solely for redress under §1981, damages for back pay accruing prior to five years before the action was filed might not be recoverable. Under 42 U.S.C. §2000e-5(g), however, back pay is allowable as an affirmative action if found appropriate to correct an unlawful employment practice. The liability for back pay under Title VII is limited to a period beginning two years prior to the filing of a charge with the Commission, 42 U.S.C. §2000e-5(g). The charges were filed by the named plaintiffs in Patterson in January and

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[5]EEOC v. New York Times Broadcasting Services, Inc., 364 F. Supp. 651, 6 FEP Cases 563 (W. D. Tenn. 1973); King v. Georgia Power Co., 295 F. Supp. 943, 1 FEP Cases 357, 69 LRRM 2094 (N. D. Ga. 1968), EEOC v. W. Elec. So. 8 FEP Cases 595, Civil No. 73-448-N (D. Md., August 15, 1974), Contra: Latino v. Rainbo Bakers, Inc., 358 F. Supp. 870, 5 FEP Cases 917 (D. Cal.) 1973.

February of 1969. The charge with respect to sex discrimination was filed with the EEOC on April 8, 1969. Although back pay would not be allowable earlier than two years prior to those dates, it would be allowed, if appropriate, from that date forward.

If, as alleged, the violations are continuing in nature, there would be no statutory limitation bar to injunctive relief.

**E. The EEOC Action Should Be Dismissed as to the Local Union for Failure to Give the Union the Opportunity to Conciliate.**

Under the circumstances of this case, failure to offer formally the union an opportunity to conciliate prior to the filing of the law action, while perhaps technically a defect, is not a basis for dismissal of the action as to the union. On July 9, 1973, an offer to conciliate was formally made, **and accepted** on July 12, 1973 by the union. While unsuccessful, the efforts at conciliation were sufficient to meet the requirements of the act and to constitute substantial compliance therewith.

**F. None of the Violations Is of a Continuing Nature.**

As hereafter pointed out, while the present system of posting and bidding, employed by American since 1968, is facially fair and neutral, past acts of discrimination have resulted in present disparity of pay, present segregated job classifications and present promotional systems based on race and sex. These constitute, in the Court's view, continuing violations of Title VII.

* * *

The Court makes the findings of fact attached hereto as Appendix II, many of which, as counsel will recognize, are adopted from portions of the proposed findings of fact submitted by the parties.

The facts listed are found with the full realization that statistics are often misleading; that certain of the plaintiffs exhibits, containing statistics do not support the conclusions attempted to be drawn from them by the plaintiffs; that the same is true for the defendants and some of their exhibits; and that on an individual basis some of the exhibits are in fact

incorrect. The inference which the Court draws from the statistics overall, however, is that, except for the non-supervisory employees in the Richmond Office, there was and is disparate income by race and sex, segregated job classifications by race and sex, and promotional systems based on race and sex. Neither the statistics nor the other evidence of the plaintiffs warrant such an inference with regard to non-supervisory employees at the Richmond Office; however, supervisory positions at all three facilities have been practically closed to blacks and females until very recently.

The omission of any finding with regard to whether a particular job classification is under-evaluated is deliberate. Aside from the fact that the experts on both sides and their respective graphs (Pl's Ex. 48 and Deft's Ex. VB-22) were not particularly persuasive, the Court seriously questions the propriety of its determining whether a particular job is under-evaluated or underpaid in actions such as these.

**[TEMPORARY VACANCIES]**

Likewise the failure to make any findings with regard to the filling of temporary vacancies is purposeful. The manner of filling such vacancies is complicated, and the present effect of past or present practices in that regard is too speculative to warrant the Court's making any finding that those practices have resulted in discrimination on account of race or sex.

The present system of posting and bidding adopted in 1968 is fair, although it needs, in the Court's view, further implementation. As indicated in the findings of fact, however, black and female employees in the Richmond Branch and the Virginia Branch have been locked in their jobs as a result of prior discriminatory practices. This is because of the static condition of the tobacco industry generally, and American in particular, and the advent of automation, both of which have limited opportunities for upward movement of present employees and for new hiring.

Even without specific proof of overt or particular acts of discrimination,[6] the statistical evidence is more than sufficient

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[6]Even if the named plaintiffs cannot show individual injury from discrimination, this, of course, does not deprive of a remedy the class of employees which the named plaintiffs represent. Parham v. S. W. Bell Tel. Co., 433 F. 2d 421, 428, 2 FEP Cases 1017 (8th Cir. 1970).

to establish a **prima facie** case of discrimination for the two branches. Under now familiar principles, the burden of rebutting such a case or of showing that the discrimination is caused by business necessity accordingly shifts to the defendants. Brown v. Gaston County Dyeing Machine Co., 457 F. 2d 1377, 4 FEP Cases 514 (4th Cir. 1972). The defendants have failed to carry this burden. American takes the position that there is no discrimination and hence, with few exceptions, does not undertake to show any business necessity. Their statistics, their testimony that better jobs were available to the blacks and females who wanted them, and their evidence of efforts to eliminate any discrimination at the two branches are unpersuasive. The situation with regard to supervisory positions at all three facilities is particularly deplorable.

**Hiring**

The same cannot be said of hiring, however, except to the extent that discrimination in the selection of supervisory personnel can be considered discrimination in hiring (and the Court does not so consider it, since such a substantial portion of the supervisory personnel is selected from the hourly-paid workers). In the Court's view, not only do the plaintiffs' statistics and other evidence not warrant an inference of discrimination insofar as hiring is concerned, but the statistics offered by the defendants and their evidence of affirmative efforts with regard to hiring rebut any **prima facie** showing made by the plaintiffs in this regard.[7]

**Crafts**

Nor are the plaintiffs entitled to relief with respect to the craft positions. The statistics reveal an unfortunate situation, to say the least, in craft positions for both blacks and females. The defendants' evidence, however, convinces the Court that quite aside from any mechanical difficulty arising from the absence of the craft unions as parties, the absence of blacks and females is not the result of discrimination by American. Among the factors leading the Court to this finding are the relatively small number of craft positions existing in the

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[7]This resolution of the hiring issue makes it unnecessary to decide the Patterson plaintiffs' motion to amend, discussed in Paragraph 2, supra. The Court's finding would be the same, however, even were the motion granted.

plants, the small turnover in those positions, the scarcity of qualified craftsmen in the Richmond SMSA, the fact that recruiting for qualified persons has been conducted in a non-discriminatory way, and the efforts that have in fact been made to recruit blacks for those positions.

**Union Involvement**

Both the Local and the International disclaim any involvement in creating or fostering impermissible conditions at American. Although wages are paid only by American, the local has been active in the fixing of wages, working conditions, and factors to be considered for promotions. Consequently it is "responsible," even if not solely, within the meaning of 42 U.S.C. §2000e5(g) for the unlawful employment practices. Moreover, the mandatory injunctive relief the Court intends to grant, involving possible changes in employee job positions and seniority contrary to terms of the existing contract between American and the union, requires that the Local be bound by any decree entered in the actions.

The International's disclaimer of involvement is refuted by the terms of the constitution of the Local which recites, in pertinent part:

> ". . . no collective bargaining and working agreements shall be consummated until first submitted to the General President [of the International] who may . . . approve or reject any proposed agreement and no such agreement can be executed without the approval of the General President. . . ."

Plaintiffs' Ex. 53.

By its terms that Constitution constitute a contract between the Local and the International unions. It, too, is responsible for the unlawful employment practices.

* * *

The Court concludes from the attached Stipulation and findings of fact and the foregoing that plaintiffs are entitled to the following relief:

A. An award of back pay, in favor of the hourly-paid blacks at the Richmond Branch and the Virginia Branch who are

members of the class, as defined, and who have not "opted out," against American and the unions.

B. An award of back pay, in favor of the hourly-paid females in the Virginia Branch and the Richmond Branch, whether currently employed or retired, who were employees of American on or after July 2, 1965, and who were performing duties in jobs, the compensation for which was less than that for similarly situated male employees, against American and the unions.

C. An adjustment to the pension and profit-sharing plans to compensate for the effects of past discrimination.

D. An award of costs, including attorneys' fees to counsel for the plaintiff in Patterson.

**[INJUNCTION]**

E. An injunction providing:

1. A company-wide (i.e., Richmond Branch and Virginia Branch) seniority system for employees other than supervisory personnel.

2. An immediate company-wide posting and bidding on each non-supervisory job in the Richmond Branch and Virginia Branch, with no qualification except seniority and a willingness to learn the job; provided, that as to the jobs of adjuster, overhaul adjuster, and adjuster-prefabrication, the qualifications listed in finding 31 shall also be required. The existing posting and bidding procedure shall be followed; but in addition there shall be promulgated and posted a job description of each job classification posted. A reasonable time will be allowed to accomplish the fore-going. In the event, after that reasonable time, class members or females are found to have displaced an incumbent employee who has had to move to a job having a lower classification, such employee will have his or her wages "red-circled" until the wage level for the job he or she holds reaches the level at which he or she is being paid.

3. Insofar as supervisory personnel are concerned in the Richmond Office, Richmond Branch and Virginia Branch, no vacancies therein shall be filled with other than females and blacks until the percentages of females and blacks in super-

visory positions approximates the percentages of females and blacks in the total work force in the Richmond SMSA.

4. A written job description for supervisory jobs which will include, but should not be limited to, objective criteria for selection for or promotion to a supervisory position.

* * *

In the formulating the above relief, the Court does not intend to mandate the awarding of a job to a person who is not qualified for it. Following a reasonable time, if an employee, whether supervisory, clerical, or factory worker, is unable to competently perform the job, he or she need not be retained in that job. This decision is to remain the employer's, and will not be disturbed absent a showing of discrimination.

The "bumping," which can occur under the relief awarded, will undoubtedly create morale problems, if not immediate economic problems, for those displaced. The relief is warranted, however, where past discrimination has allowed those persons greater job opportunity than more senior blacks and females.

The formulation of the method of calculation and distribution of the back pay award and adjustment to the pension and profit-sharing plans will be complex—sufficiently so as to tax the ingenuity and good faith of counsel. In this regard counsel are directed to confer with a view of agreeing on a plan of calculation and distribution of the back pay award for submission to the Court—and, indeed, to explore the possibility of settling the monetary aspects of the case.

A decree should be prepared embodying, in more detail, the injunctive relief awarded, and providing for a method of calculation and distribution of the back pay award as well as adjustments to the pension and profit-sharing plans. If the latter cannot be agreed upon after thirty (30) days, counsel should notify the Court and a hearing will be scheduled. If the form of the decree, insofar as injunctive relief is concerned, cannot be agreed upon within a reasonable time, counsel should also notify the Court, and a hearing on that, perhaps combined with the other hearing, may be scheduled.

## APPENDIX I

### STIPULATION NUMBER 1

The plaintiffs, John Patterson, et al, and the Equal Employment Opportunity Commission, and, the defendants, The American Tobacco Company, Local 182, Tobacco Workers' International Union, and the Tobacco Workers' International Union, do hereby stipulate and agree, subject to objection by any party as to the relevancy, competency, and materiality, of any statement contained herein and without in any way abridging the right of any party hereto to introduce additional evidence relating to any of the matters herein, as follows:

1. The defendant The American Tobacco Company, a division of American Brands, Inc., (hereinafter Company) is a corporation organized and existing under the laws of the State of New Jersey.

2. The defendant Company is an employer in an industry affecting commerce within the meaning of §701(b) of the Civil Rights Act of 1964, 42 U.S.C. §2000e(b).

3. The defendant Company owns and operates the Virginia Branch for the purpose of manufacturing cigarettes in Richmond, Virginia.

4. The defendant Company owns and operates the Richmond Branch for the purpose of manufacturing smoking (pipe) tobacco in Richmond, Virginia.

5. Although the Virginia Branch and the Richmond Branch are under separate plant management, the defendant Company has on two occasions, the last occasion being between the years 1957-1959, permanently transferred employees from one Branch to the other.

6. An office staff which performs various accounting and record keeping duties for both the Richmond and Virginia Branches, is physically located at the Virginia Branch, and is designated as the Richmond Office.

7. The Shipping Department at the Virginia Branch ships the products of the Virginia and Richmond Branches.

8. The defendant Company does not maintain any written job descriptions for any of its job classifications at the Richmond and Virginia Branches.

9. Local No. 666 of The International Brotherhood of Electrical Workers (I.B.E.W.) has jurisdiction over the job classifications of electrician and electrician's helper at the Richmond and Virginia Branches of the defendant Company.

10. Richmond Lodge No. 10 of The International Association of Machinists and Aerospace Workers' (I.A. M.A.W.) has jurisdiction over the job classifications of machinists, machinist apprentice, welder, carpenter-millwright, brick or cement work, pipefitters, adjuster-prefabrication (Virginia Branch), adjuster helper-prefabrication (Virginia Branch), conveyor adjuster (Virginia Branch), and helper at the Richmond and Virginia Branches of the defendant Company.

11. All of the other job classifications for hourly employees, which are not under the jurisdiction of the I.B.E.W. or the I.A.M.A.W. Unions, are under the jurisdiction of Local 182 of the Tobacco Workers' International Union (T.W.I.U.).

12. From 1953 to the present, the defendant Company has had federal government contracts for the sale of some of its products.

13. The Company's first Equal Employment Opportunity program was drawn up in 1956, and the second program was drawn up in 1962. (A copy of these programs is attached hereto as Exhibits A and B respectively.)

14. Beginning in 1956 the defendant Company conducted a program of plant modernization in the Prefabrication Department of the Virginia Branch which included the phase out of old machines and techniques and the initiation of new automated processes. As the result of this program, sixteen black employees were transferred to the Fabrication Department and six were sent to the Richmond Branch between 1956 and 1958.

15. The Virginia Branch of the defendant Company is divided into two major departments — Prefabrication and Fabrication.

16. The Prefabrication Department at the Virginia Branch of the defendant Company is subdivided into the Turkish, Casing, and Cutting Departments.

17. The Fabrication Department at the Virginia Branch of the defendant Company is subdivided into the Making, Packing, Shipping, and Receiving Departments.

18. The Richmond Branch of the defendant Company is divided into two major departments — Prefabrication and Fabrication.

19. The Prefabrication Department at the Richmond Branch is subdivided into the Cooking, Dipping and Drying, Long Cut, Blended Stock, High Grade, Guardite, Stem Rolling, and Shipping and Receiving Departments.

20. The Fabrication Department at the Richmond Branch contains only the Packing Department.

21. Both the Richmond and Virginia Branches of the defendant Company have a Mechanical, Medical, and Clerical Staff.

22. Prior to September 16, 1963, the Company recognized two locals of the T.W.I.U at the Richmond and Virginia Branches of the defendant Company. One of these Locals, No. 216, had an all black membership and had jurisdiction over job classifications located primarily in the Prefabrication Department of the Richmond and Virginia Branches of the defendant Company. The other T.W.I.U. Local, No. 182, had an all white membership and had jurisdiction over only those job classifications located in the Fabrication Department of the Richmond and Virginia Branches of the defendant Company.

23. Executive Order No. 10925, which was issued by President Kennedy and became effective on March 6, 1961, detailed specific penalties for a government contractor in noncompliance with federal requirements for equal employment opportunity.

24. Approximately 81% of the hourly paid workers in the Prefabrication Department of the Virginia Branch are black. None of the adjusters-prefabrication have ever been black.

25. At the present time, 2 of the 3 adjuster helpers-prefabrication at the Virginia Branch are black.

26. In order to become an adjuster-prefabrication, an employee must first serve as an adjuster helper-prefabrication.

27. In order to become an adjuster learner in the Fabrication Department of the Virginia Branch, it is necessary that an employee be a packing, Schmermund or making machine operator. Only packing and Schmermund machine operators are eligible to become adjuster learner-packers, and only making machine operators are eligible to become adjuster learner-makers.

28. The labor rates for hourly employees and for all job classifications at both the Richmond and Virginia Branches under the jurisdiction of Local 182 and former Local 216 of the Tobacco Workers' International Union have been negotiated for every contract period since 1937.

29. John Patterson was initially employed by the defendant Company as a tobacco tub handler at the Virginia Branch on April 4, 1946.

30. Percy Taylor was initially employed by the defendant Company as a laborer in the Prefabrication Department at the Virginia Branch on May 12, 1941 and was re-employed on September 19, 1944 after quitting on May 5, 1944.

31. James Randolph was initially employed by the defendant Company as a laborer in the Prefabrication Department of the Virginia Branch on September 23, 1952.

32. Marion Moshoe was initially employed by the defendant Company at the Richmond Branch as a laborer in the Prefabrication Department on February 3, 1958.

33. Edmund Page was initially employed by the defendant Company as a laborer in the Prefabrication Department of the Richmond Branch on August 20, 1948.

34. All of the named plaintiffs joined Local 216, T.W.I.U after being hired by the defendant Company.

35. None of the named plaintiffs became members of the defendant Local 182 until September 16, 1963.

36. All of the named plaintiffs have been members of the defendant Local 182 since September 16, 1963, and are currently members of that Local.

37. The named plaintiffs are blacks who are currently employed as hourly production workers by the defendant Company at either the Richmond Branch or the Virginia Branch and are members of the defendant Local 182 of the Tobacco Workers' International Union.

38. On January 15, 1968 the defendant Company instituted a system (which is still in effect) whereby permanent vacancies in classifications under the jurisdiction of Local 182 of the T.W.I.U. at both the Richmond and Virginia Branches were filled through job posting and employee bidding. Under this system, all such vacancies are posted on plant bulletin boards for seven working days. Anyone in the bargaining unit may sign any posting (bid on any job) with the exception of postings for vacancies in the adjuster, learner adjuster, examiner-making, examiner-packing, and dryer operator, textile dryer operator, overhaul adjuster-making or packing, and turbine operators classifications at the Virginia Branch and adjuster and learner adjuster at the Richmond Branch.

39. Only employees who have become learner adjusters are eligible to move into vacancies in the adjuster classification.

40. Only employees who are experienced as a packing or making machine operator or Schmermund boxer operator are eligible to bid on vacancies in the learner adjuster classification.

41. Only employees who are experienced as a catcher are eligible to bid on vacancies in the examiner-making classification.

42. Only employees who are experienced as line searchers —Schmermund boxer are eligible to bid on vacancies in the examiner-packing classification.

43. Only those employees who have become an assistant adt dryer operator are eligible to move into vacancies in the adt dryer operator classification.

44. Only those employees who have become an assistant textile dryer operator are eligible to move into vacancies in the textile dryer operator classification.

45. Only those employees who have become a making or packing adjuster are eligible to move to vacancies in the overhaul adjuster classification.

46. Only those employees who have become an adjuster helper-prefabrication are eligible to move to the adjuster-prefabrication classification.

47. Only those employees who have become boiler operators are eligible to move into vacancies in the turbine operator classification.

48. The only formal or procedural requirement for an employee's bidding on a job, except those noted in #38, is for the employee to sign the posting in any location where it is displayed. When the posting is removed from the bulletin boards at the end of the seven working days, the plant seniority dates of all persons signing are compared and the most senior signer is given the first opportunity to learn the job.

49. As a general rule, since September 16, 1963, employees within the Local 182 of the T.W.I.U. bargaining unit are given preference for any vacancies in job classifications within the bargaining unit, and hiring is performed only for entry level jobs unless all of the employees refuse to accept a vacancy.

50. None of the job classifications under the jurisdiction of the I.B.E.W. or the I.A.M.A.W. Unions are subject to the posting and bidding system of filling permanent vacancies.

51. Under the posting and bidding procedure, once an employee has bid on and been awarded a permanent position, he/she enters into on-the-job-training wherein experienced employees who are already classified in a particular position instruct the employee new to the position as to the duties and responsibilities of the position.

52. If any employee decides within fourteen days after beginning his training period that he/she does not wish to accept the position, that employee can "sign off" the job and return to his/her former position.

53. If an employee decides after being assigned to a position for over fourteen days that he does not wish to accept that position, he may not "sign off" the job. However, he may sign another posting and, if he is successful, thereby remove himself from the first position.

54. There are no established limits on the length of time during which an employee may receive on-the-job training for any job classification at either the Richmond or Virginia Branch of the defendant Company.

55. The superintendent has the discretion to remove a trainee when in his opinion, after a reasonable period of time, that employee has not demonstrated that he can perform that particular job.

56. Prior to selecting an employee for promotion to a supervisory position, the defendant Company gives the local union an opportunity to make recommendations.

57. The defendant Company has never had an educational requirement for employees promoted from hourly production jobs to supervisory positions.

58. Hourly employees of the defendant Company do not have to apply or express their interest in holding a supervisory position in order to be considered for promotion to such a position.

59. The defendant Company does not have any written guidelines which are used in selecting supervisory personnel.

60. The selection of supervisors at the Richmond and Virginia Branches of the defendant Company is left to the discretion of those employees at the superintendent and manager levels of plant management.

EXHIBIT A

**Equal Job Opportunity**

The following points were agreed to at the meeting held April 24, 1956, and constitute a plan of equal job opportunity in the manufacturing departments of the Company, in accordance with the clause in government contracts:

How many employees will be affected?

This was answered by saying that management would select the employees, as always there are employees who do not qualify for the new job and the individual employee has the right to refuse and stay on the job where he is satisfied.

Seniority status of employees moved to new jobs?

Employees given the opportunity to move in a new classification will advance in order of placement, and move backwards in reverse order, and, if necessary, return to the job from whence they came.

The jurisdiction?

The local that has jurisdiction and is bargaining for a particular classification will continue to hold jurisdiction and bargain for all employees in the classification, regardless of color or affiliation.

Racial problems?

If a problem of a racial nature becomes a grievance, the shop committee of both local unions will meet and agree on the unions' position, which will be presented to management for settlement in accordance with the grievance clause (Article 13) in the contract.

Employment?

New employees will be hired as to races on the basis of the approximate census in the plant area. This will be followed if applicants qualify for the job and are available when called.

## EXHIBIT B

## EQUAL JOB OPPORTUNITY

There is equal job opportunity in accordance with the clause in government contracts. The following points represent the understanding of the Company and the Unions with respect to employees to whom the government contract clause is applicable and who are represented by the Unions:

**Selection for New Jobs**

Management will continue to select employees for new jobs on the basis of their qualifications and to recognize the right of an employee to refuse a new job and stay on the job where he is satisfied.

**Seniority Status of Employees Moved to New Jobs**

Employees given the opportunity to move in a new classification will advance in order of placement, and move backwards in reverse order, and, if necessary, return to the job from whence they came.

**The Jurisdiction**

The local that has jurisdiction and is bargaining for a particular classification will continue to hold jurisdiction and bargain for all employees in the classification, regardless of affiliation.

**Grievances Where Locals Disagree**

If a problem on which two locals disagree becomes a grievance, the shop committee of both local unions will meet and agree on the unions' position, which will be presented to management for settlement in accordance with the Grievance Clause in the Union Contract.

**Employment**

The Company is an equal opportunity employer and, as such, will provide equal employment opportunities without regard to race, color, creed or national origin.

## APPENDIX II

**A. Facts Relevant to the Issues of Both Sex and Race Discrimination:**

1. American's facilities are located in the Richmond Standard Metropolitan Statistical Area (SMSA) which includes the City of Richmond and the counties of Henrico, Hanover and Chesterfield.

2. The 1960 census, which did not include Hanover County, shows:

| | | |
|---|---|---|
| Richmond SMSA Population | 408,494 | |
| Black Population | 107,366 | 26% |
| Female Population | 227,650 | 55% |

3. The 1970 census, which included all the political subdivisions in the Richmond SMSA, shows:

| | | |
|---|---|---|
| Richmond SMSA Population | 518,319 | |
| Black Population | 130,241 | 25% |
| Female Population | 272,803 | 52% |

4. The 1970-1973 Virginia Employment Commission estimate of the percent of the total work force which is comprised of blacks and females in the Richmond SMSA is as follows:

Minority

(Black) 23.6% of the Total Work Force
Female 41.0% of the Total Work Force

5. The Richmond Office is located within the Virginia Branch. The Virginia Branch and the Richmond Branch, despite difference in street addresses,[1] are physically located very near one another. The presently practiced plant-wide seniority system, i.e., seniority determined within each of the three facilities, has, except with respect to the Richmond Office, contributed to the perpetuation of the discrimination found in finding 33 and 81. It has not been shown to be justified by any business necessity.

6. No new employees were hired to fill job classifications under the jurisdiction of the Tobacco Workers' International Union at the Virginia Branch from September 12, 1955 through May 12, 1966, nor at the Richmond Branch from September 12, 1955 through June 12, 1964.

**[EMPLOYEES CANVASSED]**

7. Between September 16, 1963, and January 15, 1968, employees at the Virginia Branch were canvassed to determine

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[1]The addresses of the Virginia Branch and the Richmond Branch, respectively, are 26th and Cary Streets and 21st and Grace Streets, Richmond, Virginia. A map, not to scale, showing the relative positions of the two plants, is attached as Appendix III, [Ed. note:—Omitted.]

if they were interested in procuring a position in a given job classification should a vacancy later occur.

8. Job "qualifications," as used between September 16, 1963, and January 15, 1968, were never reduced to writing. Employees learned of the specific "qualifications" either by talking to supervisory personnel or representatives of the union, or, by observing the system of promotion in operation. "Qualified," as used for this period, referred to whether or not an employee had filled a particular job before and was, in the opinion of supervisory personnel, familiar with it.

9. Employees who are permanently classified in jobs which are located in the Prefabrication Department of either branch of American generally fill temporary vacancies within the Prefabrication Department. Employees who are permanently classified in jobs which are located in the Fabrication Department of either branch of the defendant company generally fill temporary vacancies within the Fabrication Department.

10. Local 182 and the Tobacco Workers' International Union entered into collective bargaining agreements, governing, **inter alia**, wage rates for employees under its jurisdiction, which became effective in 1954, 1956, 1958, 1960, 1962, 1965, 1968, 1971 and 1974, respectively. The unions have jurisdiction over employees at the Richmond Branch and the Virginia Branch, but not the Richmond office.

11. Supervisory personnel at the Virginia and Richmond Branches of American include the job classifications of assistant foreman, foreman, assistant superintendent, superintendent, assistant manager and manager.

12. Supervisory personnel at the Richmond and Virginia Branches of American have traditionally been either promoted from the ranks of the hourly employees, hired as new employees or transferred from other branches. Since 1960, 34% of the vacancies at the assistant foreman level have been filled by promoting former hourly employees of American.

13. Prior to selecting an employee for promotion to a supervisory position, American gives the local union an opportunity to make recommendations.

**[FINAL DECISION]**

14. When the union and American's recommendation are not the same as to who should be promoted to a supervisory position, American's branch manager makes the final decision.

15. The defendant company has never had an educational requirement for employees promoted to supervisory positions from hourly production classifications.

16. Since July 1, 1965, at least eighteen employees have been hired for or promoted to the position of assistant foreman at the Virginia Branch.

17. Since July 1, 1965, at least nine employees have been hired for or promoted to the position of assistant foreman at the Richmond Branch.

18. Hourly employees of American do not have to apply for or express an interest in a supervisory position in order to be considered for promotion to such a position.

19. American does not have any written guidelines or objective standards which are used in selecting supervisory personnel.

20. Craft positions at the Virginia Branch include the job classifications of "machinist, machinist apprentice, electrician, electrician's helper, welder, carpenter-millwright, brick or cement worker, helper and pipefitter."

21. Craft positions at the Richmond Branch include the job classifications of machinist, machinist's helper, electrician, pipefitter, and carpenter.

22. Until 1971, American required that all applicants who are being considered for positions as clerks in the Richmond Office take the Minnesota Clerical Test. This test has never been certified as being either job related or predictive of job performance.

**[RETIREMENT PLAN]**

23. American has had a retirement plan for all of its employees at the Richmond and Virginia Branches since before 1942, and a profit-sharing plan since 1960.

24. An employee's share in profit-sharing and his benefits under the present retirement plan depend on yearly gross earnings.

25. Total employment[2] at the Virginia Branch declined from 2,157 in 1953 to 1,027 in 1974. Factory workers declined from 1,476 in 1962 to 829 in 1974. Factory workers hired subsequent to May 16, 1966, were all hired into entry-level jobs and were not hired for any particular vacancy. There are no records to indicate the race of applicants from 1955 to February, 1972.

26. Total employment at the Richmond Branch declined from 399 in 1953 to 218 in 1973. Factory workers declined from 227 in 1962 to 156 in 1973. There are no records to indicate the race of applicants prior to March, 1972.

27. In 1961, the Richmond Office had 59 employees, excluding supervisors; in 1969 there were 69 such employees; and, on February 28, 1974, there were 55 such employees.

28. From January 1, 1963, to June 1, 1973, there have been over 55 vacancies in the assistant foreman position at the Virginia Branch.

29. From January 1, 1963 to June 1, 1973, there have been over 30 vacancies in the assistant foreman position at the Richmond Branch.

30. Since 1966, there have been 4 vacancies in the position of supervisor in the Richmond Office.

31. The so-called "lines of progression" described in Paragraphs 38 through 47 of Stipulation I (Appendix I), with the exception of the requirements described in Paragraph 39 (learner adjuster in order to become an adjuster), Paragraph 45 (making or packing adjuster in order to become an overhaul adjuster) and Paragraph 46 (adjuster helper-prefabrication in order to become an adjuster-prefabrication) are not justified by any business necessity. The lines of progression other than

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[2]The findings with regard to employment by American are broken down into figures and percentages for the Virginia Branch, the Richmond Branch and the Richmond Office. Because the Court finds that these three offices should be combined and considered as being at one location, the total figures have been considered for the purpose of the Court's ultimate findings.

these three have perpetuated past discrimination on the basis of sex and race.

**B. Facts Relevant to the Issue of Race Discrimination:**

32. Prior to September 16, 1963, American discriminated on the basis of race with respect to facilities, union representation, wage structure, departments, seniority lines and hiring.

33. As a result of the low number of posted permanent vacancies at the Virginia and Richmond Branches, most black employees have been unable to move into the higher paying job classifications which had previously been restricted to whites. Consequently, a pattern of racially segregated job classifications and departments still exists in spite of American's adoption of a posting and bidding system.

34. Many of the positions in the job classifications which were previously restricted to whites are now held by white employees, with less seniority than black employees, who were able to obtain these positions prior to 1968 by virtue of American's use of a racially discriminatory promotion system of plant seniority "plus qualifications," or by virtue of American's initial assignment of whites directly into these positions.

35. Black employees have received lesser amounts than white employees with comparable seniority under American's profit-sharing and retirement plans because of American's disparate wage structure and the inability of blacks to gain access to higher paying jobs.

36. Local 182 and The Tobacco Workers' International Union have negotiated and entered into labor agreements which have determined working conditions, wage rates, employee benefits and conditions for promotion. These have had the effect of continuing blacks in the lower paying, less desirable jobs at the Richmond and Virginia Branches.

37. Prior to 1963, black employees of American did not fill any temporary vacancies in job classifications which were restricted to whites. During that same period, white employees did not fill any temporary vacancies in job classifications which were restricted to blacks.

**[MISCELLANEOUS DEPT.]**

38. Prior to September 16, 1963, the Miscellaneous Department at the Virginia Branch contained two job classifications, "cleaner" and "elevator operator." All of the employees holding these classifications in this department were black. During this period, these employees were responsible for manual materials handling, by-products removal from the production floors and cleaning the fabrication cafeteria eating area and two fabrication rest rooms.

39. For the years 1965 through 1973, black hourly-paid production workers at the Virginia Branch generally had a lower mean income than whites with equivalent plant seniority.

40. For the years 1965 through 1973, black hourly-paid production workers at the Richmond Branch generally had a lower mean income than whites with equivalent plant seniority.

41. Jobs in the Prefabrication Department of the Richmond Branch historically have had lower wage rates than jobs in the Fabrication Department of that Branch.

42. Jobs in the Prefabrication Department of the Virginia Branch have generally had lower wage rates than jobs in the Fabrication Department of that Branch.

43. Traditionally at both branches there have been more blacks in the Prefabrication Department than whites, and more whites in the Fabrication Department than blacks.

44. Jobs at the Richmond Branch have traditionally had lower wage rates than jobs at the Virginia Branch.

**['OPERATOR-GUARDITE']**

45. The job classification of "operator-guardite" has traditionally had the highest wage rate of any job in the Prefabrication Department of the Richmond Branch. When this classification was first introduced, the defendant company transferred two white males from the Fabrication Department, one to operate a guardite machine and the other to serve as supervisor in the guardite operation in the Prefabrication Department. All of the other employees in the guardite operation

were black. There has, however, only been one guardite machine operator, a white male, who has held the job since its inception.

46.[3] As of February 26, 1963, 196 or 11.8% of the 1,653 employees at the Virginia Branch of the defendant company were black. As of January 15, 1963, of the approximate 100 supervisors none was black.

47. The first black supervisor at the Virginia Branch was promoted from the ranks of the hourly employees by American on January 16, 1963.

48. As of May 16, 1969, of the 71 employees in supervisory positions at the Virginia Branch of American, 3 were black.

49. As of April 16, 1973, 165, or 15.49% of the 1,071 employees at the Virginia Branch of the defendant company were black. As of April 16, 1973, 5 or 7.24% of the 69 employees in supervisory positions at the Virginia Branch were black.

50. As of January 1, 1974, there were 6 black supervisors at the Virginia Branch.

**[BLACK SUPERVISOR]**

51. The first black supervisor at the Richmond Branch was promoted from the ranks of the hourly employees on June 1, 1966, and was assigned to the Prefabrication Department.

52. As of April 17, 1967, 79 or 32.1% of the 246 employees at the Richmond Branch were black.

53. The second black supervisor at the Richmond Branch was promoted from the ranks of the hourly employees on February 1, 1971.

54. As of March 10, 1971, 82 or 36.7% of the 223 employees at the Richmond Branch were black. On that same date 2 or 6.6% of the 30 employees in supervisory positions at the Richmond Branch were black.

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[3]The percentages in this and subsequent findings, namely, 46, 49, 52, 54 and 55, while apparently in some instance inconsistent with the finding in Paragraphs 70, 71, 72 and 73, cover years not covered by the latter and include all employees as opposed to just factory workers.

55. As of April 16, 1973, 85 or 40.67% of the 209 employees at the Richmond Branch were black.

56. As of June 1, 1973, 3 or 9.6% of the 31 employees in supervisory positions at the Richmond Branch were black.

57. As of April 15, 1973, 250 or 19.53% of the 1,280 employees at both Branches of American were black.

58. Only one black has ever held any of the positions of machinist, machinists helper, electrician, pipefitter or carpenter at the Richmond Branch.

59. None of the employees who completed their apprenticeships at the Virginia Branch was black.

60. One of the employees who completed his apprenticeship at the Richmond Branch was black. This employee, Mr. Frank Schools, is the only black ever employed in a craft position at the Richmond Branch.

61. Only three blacks have ever been employed as craftsmen at the Virginia Branch.

**[OFFICE FORCE]**

62. As of April 12, 1974, 62 persons were employed in the Richmond Office, 13 of whom were black. The total work force is made up of 55 clerical employees, 6 supervisory employees, and 1 office manager. All of the black employees were classified as clerks.

The positions of office manager, assistant office manager, and supervisor in the Richmond Office have never been held by a black.

63. Although John Patterson was initially assigned to the Fabrication Department of the Virginia Branch on April 4, 1946, he could not be classified in most of the job classifications in that department until September 16, 1963, because he was black.

64. Percy Taylor and James Randolph were not eligible to hold most of the job classifications in the Fabrication Department of the Virginia Branch, including those of "Packing or

Making Machine Operators," until September 16, 1963, because they were black.

65. During the period from 1954 to 1971, American sometimes assigned Marion Moshoe, a black and a named plaintiff, to various machines in the Prefabrication Department as an operator. While performing these assignments, he would be paid at the lower laborer wage rate.

66. From 1960 to the present time, Edmund Page, a black and a named plaintiff, has been classified as an "operator-prefabrication and other equipment." Employees in this classification may operate as many as eight different machines. All of the employees in this classification are paid at the same wage rate.

67. All of the named plaintiffs in Patterson joined Local 216, T.W.I.U., after being hired by the defendant company.

68. None of the named plaintiffs in Patterson or members of the class they represent was eligible for membership in Local 182 until September 16, 1963, because they were black.

69. All of the named plaintiffs in Patterson have been members of Local 182 since September 16, 1963, and are currently members of that Local.

**[HIRING STATISTICS]**

70.[4] Although there are no statistics with respect to any applicants before 1972, the evidence reveals that of those persons hired into factory positions at the Virginia Branch, from 1966, when hiring began, through 1973, 152 were black and 69 were white. A breakdown of these is as follows:

| | White | Black |
|---|---|---|
| 1966 | 14 (32%) | 30 (68%) |
| 1967 | 5 (24%) | 16 (76%) |
| 1968 | 14 (36%) | 25 (64%) |
| 1969 | 5 (45%) | 6 (55%) |
| 1970 | 7 (35%) | 13 (65%) |
| | None | None |
| 1972 | 1 (06%) | 17 (94%) |
| 1973 | 23 (34%) | 45 (66%) |
| Totals | 69 (31%) | 152 (69%) |

[4]The statistics in findings numbered 70, 71, 72 and 73 refer to "factory workers." These findings are taken from evidence offered by American and apparently exclude supervisory personnel and others.

71. The percentage of black factory workers at the Virginia Branch from 1962 to February 28, 1974, is as follows:

| Date | Blacks | Total | Percent Black |
|---|---|---|---|
| 1962 | 201 | 1,476 | 14% |
| 1963 | 193 | 1,441 | 13% |
| 1964 | 188 | 1,397 | 13% |
| 1965 | 169 | 1,321 | 13% |
| 1966 | 160 | 1,263 | 13% |
| 1967 | 191 | 1,218 | 16% |
| 1968 | 175 | 1,151 | 15% |
| 1969 | 173 | 1,099 | 16% |
| 1970 | 161 | 1,046 | 15% |
| 1971 | 157 | 995 | 16% |
| 1972 | 145 | 923 | 16% |
| 1973 | 149 | 864 | 17% |
| 1974 (2/28) | 169 | 829 | 20% |

72. Of the persons hired into the Richmond Branch from 1964 to 1973, 133 were black and 33 were white. A breakdown by year of these is as follows:

| | White | Black |
|---|---|---|
| 1964 | 5 (38%) | 8 ( 62%) |
| 1965 and 1966 | no hiring | |
| 1967 | 1 (14%) | 6 ( 86%) |
| 1968 | 11 (31%) | 24 ( 69%) |
| 1969 | 0 ( 0%) | 6 (100%) |
| 1970 | 7 (37%) | 12 ( 63%) |
| 1971 | 2 (13%) | 13 ( 87%) |
| 1972 | 6 (16%) | 32 ( 84%) |
| 1973 | 1 (03%) | 32 ( 97%) |
| Totals | 33 (20%) | 133 ( 80%) |

73. The percentage of black factory workers at the Richmond Branch in 1962, 1964, 1966, 1968, 1970, 1972 and 1973 was:

| Date | Blacks | Total | Percent Black |
|---|---|---|---|
| 1962 | 93 | 227 | 41% |
| [sic 1964] | 93 | 228 | 41% |
| 1966 | 78 | 190 | 41% |
| 1968 | 89 | 189 | 47% |
| 1970 | 80 | 164 | 49% |
| 1972 | 79 | 151 | 52% |
| 1973 | 90 | 156 | 58% |

74. In 1973, approximately 47% (27 persons) of the total applications for jobs were filed by blacks and 40% (6 persons) of the total number of hires were black in the Richmond Office. The race of four applicants is unknown.

**[RICHMOND OFFICE]**

75. In the Richmond Office, from 1961 to 1974, 17% (22 Persons) of all persons hired were black; from 1965 to 1974, 18% (17 persons) of all persons hired were black; and, from 1970 to 1974, 42% (10 persons) of all persons hired were black.

In 1961 there were no black employees in the Richmond Office. In 1974, 24% (13 persons) of the nonsupervisory employees were black.

76. There are approximately two hundred noncraft hourly paid job classifications at the Virginia Branch. As of 1973 there were eighteen which had never been held by a white employee, and ten which had never been held by a black employee.

77. There are approximately 43 noncraft hourly paid job classifications at the Richmond Branch. As of 1973 there were twenty-one which had never been held by a white employee; and nine which had never been held by a black employee.

78. The positions of office manager, assistant office manager, and supervisor in the Richmond Office have never been held by a black employee.

79. Since 1966, there have been four vacancies in the position of supervisor in the Richmond Office. One supervisory vacancy in 1966 was filled by a white male employee who had less seniority than several white females in the Richmond Office. Two supervisory positions were filled on August 1, 1973, by white male employees transferred from the Charleston Branch which was being phased out. One of these two employees had been the office manager at the Charleston Branch, while the other had been an office supervisor in that office. As of April 12, 1974, there was one unfilled supervisory position in the Richmond Office.

**C. Facts Relevant to the Issues of Sex Discrimination:**

80. Prior to September 16, 1963, American discriminated on the basis of sex with respect to wage structure, departments, seniority lines and hiring.

81. The same finding, except with regard to sex instead of race, is made as in finding 33.

82. As of January 15, 1963, of the approximately 1,653 employees at the Virginia Branch of the defendant company there were approximately 100 supervisors of which none was female.

83. As of May 16, 1969, of the 71 employees in supervisory positions at the Virginia Branch of American none was female.

84. As of April 16, 1973, 453 or 42.3% of the employees at the Virginia Branch were female. As of April 16, 1973, of the 69 employees in supervisory positions, 3 or 4.34% were female.

85. As of April 17, 1967, 107 or 43.5% of the employees at the Richmond Branch were female.

86. As of February 1, 1971, none of the 30 supervisors at the Richmond Branch were female, with the exception of the office supervisor.

87. As of April 16, 1973, 32% of the employees at the Richmond Branch were female.

88. As of June 1, 1973, 31 employees in supervisory positions at the Richmond Branch, 2 or 6.4% were female.

89. In 1972, 18.3% (26 persons) of the total applications for jobs were filed by females and none was hired at the Virginia Branch. In 1973, 39% (274 persons) of the total applications for jobs were filed by females and 19% (12 persons) of the total hires were female.

**[FEMALE WORKERS]**

90. The percentage of female factory workers at the Virginia Branch from 1962 to February 28, 1974, is as follows:

| Date | Females | Total | Percent Female |
|---|---|---|---|
| 1962 | 687 | 1,476 | 47% |
| 1963 | 675 | 1,441 | 47% |
| 1964 | 663 | 1,397 | 47% |
| 1965 | 629 | 1,321 | 48% |
| 1966 | 607 | 1,263 | 48% |
| 1967 | 578 | 1,218 | 47% |
| 1968 | 531 | 1,151 | 46% |
| 1969 | 505 | 1,099 | 46% |
| 1970 | 478 | 1,046 | 46% |
| 1971 | 453 | 995 | 46% |
| 1972 | 418 | 923 | 45% |
| 1973 | 385 | 864 | 45% |
| 1974 (2/28) | 359 | 829 | 43% |

91. In 1972, 12% (39 persons) of the total applications for jobs were filed by females and none was hired at the Richmond Branch. In 1973, 30% (146 persons) of the total applications for jobs were filed by females and 30% (10 persons) of the total hires were female.

92. The percent of female factory workers at the Richmond Branch in 1962, 1964, 1966, 1968, 1970, 1972 and 1973 was:

| Date | Females | Total | Percent Female |
|---|---|---|---|
| 1962 | 109 | 227 | 48% |
| 1964 | 109 | 228 | 48% |
| 1966 | 89 | 190 | 47% |
| 1968 | 89 | 189 | 47% |
| 1970 | 66 | 164 | 40% |
| 1972 | 54 | 151 | 36% |
| 1973 | 56 | 156 | 36% |

93. During the period 1961 to 1974, approximately 93% of all persons hired at the Richmond Office were female and in 1974, 89% (49 persons) were female. In 1961, 75% (44 persons) of the non-supervisory employees were female and in 1974, 89% (49 persons) were female.

94. There are approximately two hundred non-craft hourly paid job classifications at the Virginia Branch. As of 1973, there were thirty-three such positions which had never been held by a female employee, and six which had never been held by a male employee.

95. There are approximately 43 non-craft hourly paid job classifications at the Richmond Branch. As of 1973, there were thirty-two such positions which had never been held by a female employee, and six which had never been held by a male employee.

**['MALE' CLASSIFICATIONS]**

96. Until at least September 16, 1963, American considered the following Virginia Branch job classifications to be "male" classifications:

Adjuster—Overhaul—Making and Packing

Adjuster—Controller

Adjuster—Making—From Filter Operator (for 7 Machines)

Adjuster—Making and Packing—70 mm or 85 mm (13-14-15 Machines)

Operator—Turbine

Adjuster—Making and Packing—70 mm or 85 mm (up to and including 12 Machines)

Operator—Boiler

Painter—Spray

Operator—Air Conditioning

Painters—Brush

Cigarette—Drum Maintenance

Operator—Making—Filter Tip—1250 Cpm.

Operator—Making (Combination Unit)—All Length—1500 Cpm.

Operator—Packing (with Combination Unit or Pneumatic System) All Lengths—with Automatic Package Handling—150 ppm.

Operator and Relief—Making—85 mm Filter (1050 cpm.)

Operator—Making (Combination Unit)—70 mm (1250 cpm.) and 85 mm (1125 cpm.)

Operator—Packing Machine (Combination Unit)—70 mm (125.5 ppm.) and 85 mm (112.5 ppm.)

Tractor and Trailer Drivers

Operator and Relief—Box Machines—2 Machines (over 15 packers)

Adjuster—Learner (Making and Packing—70 mm and 85 mm)

Cutting Stamps

Operator and Relief—Box Machines—2 Machines (thru 15 Packers)

Operator—Container Packer (25 or more Machines)

Operator and Relief—Making and Packing—70 mm (1125 cpm.) (112.5 ppm.) and 85 mm (930 cpm.) (105 ppm.)

Operator—Dryer (Textile or Adt)

Operator—Container Packer (from 17 through 25 Machines)

Truck Driver

Crew Leader—Shipping

Operator—Hot Sealing Machine (Export)

Strapping and/or Sealing Containers (Export)

Cooking Dip and Invert

Past Cook

Packers and Checkers—Shipping

Operator—Industrial Trucks

Chauffeurs—Light Delivery

Operator and Relief—Box Machines—1 Machine (over 8 Packers)

Operator Assistant—Dryer (Textile and Adt)

Operator—Overshot Cylinder and Overshot Cylinder and Mixing

Operator—Wringing Machine

Sealing Containers

Stock Handlers—Shipping

Truck Helpers

Oiler

Operator—Container Packer (up thru 16 Machines)

Watchman

Operator and Relief—Box Machines—1 Machine (thru 8 Packers)

Operator—Scrubbing Machine

Coal Handlers

Bulker—Strip Tobacco

Factory Supply and Floorman

Hopper Fillers

Lay Out Supplies

Making Flavoring Helper

Operator—Tag Meter

Weighers and Handlers (Turkish)

Cooking Dip and Invert Helper

Bulker—Cut Tobacco

Bulker—Trucking Leaf

Feeders—Strip Stems or Shorts

General Helper

Operator—Palletizing Truck

Silver Machine Man

Sweco and Air Table Man

Machine Cleaners

Baking Scrap Paper

Cleaners (Male)

Cleaners—Air Conditioning System

Dressing Cut Tobacco

Feeder—Casing Department

Floor Labor

Material Supply Distribution

Operator—Elevator

Receiving and/or Handling Supplies

**['FEMALE' CLASSIFICATIONS]**

97. Until at least September 16, 1963, American considered the following Virginia job classifications to be "female" classifications:

Closing and Sealing Containers (Female)—Export

Forming and Inserting Bags in Containers—Export

Packing Containers—Export

Relief—Export

Examiners—Automatic

Catcher—Filter Tip—1250 cpm.

Catchers and Relief (Combination Unit—All Lengths—1500 cpm.)

Cigarette Paper Records

Cigarette Weighing—Individual

Examiners—Manual

Sieve Testing

Catchers and Relief—70 mm (up to 1125 cpm.)

Catchers and Relief—70 mm. (1250 cpm.) and 85 mm (1125 cpm.) Combination Units

Packing in Cartons—Combination Unit

Packing Containers by Hand—85 mm (Female)—More than 6 Packing Machines

Stencil Cutters

Catchers and Relief—70 mm (up to 1025 cpm.) 85 mm (up to 930 cpm.)

Packing Containers by Hand—85 mm (Female)—6 Packing Machines or less

Packing into Cartons and Relief

Carton Searchers

Rehandler

Packing Container by Hand—70 mm (female)

Feeders—Cutting Machine (Female)

Cleaners (Female)

Feeders—(Female)

Pickers and Searchers (Female)

98. For the years 1965 through 1972, female hourly paid production workers at the Virginia Branch had a lower mean income than males with comparable seniority.

99. For the years 1967 through 1972, female hourly paid production workers at the Richmond Branch had a lower mean income than males with comparable seniority.

**[FEMALE SUPERVISOR]**

100. In 1972, American selected from the ranks of its hourly production workers its first female supervisor at the Virginia Branch, to fill the position of assistant foreman. At that time approximately 43% (490) of the total Virginia Branch work force was female.

101. As of June 1, 1973, there were three female assistant foremen at the Virginia Branch out of a total supervisory staff of 73. Thus, of the supervisors at the Virginia Branch 4 percent were female.

102. In 1967, American selected from the ranks of the hourly production workers its first female supervisor at the Richmond Branch to fill the position of assistant foreman. At the time approximately 31% (107) of the total Richmond work force was female.

103. As of June 1, 1973, there were thirty-one supervisors at the Richmond Branch of whom two (6%) were females.

104. No female has ever held a craft position at the Virginia Branch.

105. No female has ever held a craft position at the Richmond Branch.

106. The positions of office manager, assistant office manager, and supervisor in the Richmond Office have never been held by a female employee.

107. Since 1966, there have been four vacancies in the position of supervisor in the Richmond Office. One supervisory vacancy in 1966 was filled by a white male employee who had less seniority than several white females in the Richmond Office. Two supervisory positions were filled on August 1, 1973,

by white male employees transferred from the Charleston Branch which was being phased out. One of these two employees had been the office manager at the charleston Branch, while the other had been an office supervisor at that office. As of April 12, 1974, there was one unfilled supervisory position in the Richmond Office.

IN THE

# United States District Court

FOR THE

EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

| | |
|---|---|
| JOHN PATTERSON, et al., Plaintiffs, V. THE AMERICAN TOBACCO CO., et al., Defendants. | CIVIL ACTION No. 101-73-R |
| EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Plaintiff. V. AMERICAN BRANDS, INC., et al., Defendants. | CIVIL ACTION No. 104-73-R |

## MEMORANDUM OPINION

The Court has considered the defendants' Motion to Amend and Supplement Findings of Fact and Conclusions of Law and Motion to Proffer Additional Evidence, the Plaintiffs' Motion to Alter Judgment and the proposed decrees and objections thereto submitted by the parties.

### Statute of Limitations

The plaintiffs' Motion to Alter Judgment is addressed to the applicable limitation for the back pay award. The Court adheres to its original conclusion that under 42 U.S.C. §1981 the limitation is five years prior to March 2, 1973, which would be March 2, 1968, if the claims here asserted were limited to 42 U.S.C. §1981. They are not so limited, however, since Title VII claims are asserted, as a result of which the back pay awards may go back as far as two years prior to the filing of charges with the EEOC, i.e., until January or February, 1967, for race discrimination and until April, 1967, for the sex discrimination.

The Court further concludes that the five year limitation is not tolled during the pendency of the charges before the EEOC. There is respectable authority to the contrary;[1] however, the two claims are separate and independent and there seems to be no persuasive reason to treat the instant claim differently from other separate and independent ones, a treatment which does not, traditionally, toll the limitation of one claim while another is being administratively pursued. **Johnson v. Railway Express Agency, Inc.**, 489 F. 2d 525, 531 (6th Cir. 1973), **cert. granted** 417 U.S. 929 (1974) (No. 73-1543; argued Dec. 11, 1974). While there may be policy reasons for such tolling, in the Court's view those should be left to the wisdom of the legislative branch of government.

**American's Motion to Amend and Supplement and to Proffer Additional Evidence**

The Court has examined the detailed amendments and supplements requested, and while it hesitates to treat the motions, obviously prepared with sincerity and industriousness, in a summary manner, the requests are in actuality a reargument of the merits of the actions. No finding of substance is requested that has not been requested before. No piece of evidence now cited in support of the request has not been considered previously. The changes requested as to form are unnecessary in the Court's opinion, and the requested supplemental findings are adequately covered in existing ones. The Motion to Amend and Supplement is accordingly denied.

The Motion to Proffer Additional Evidence must also be denied. The case was thoroughly and skillfully presented on July 15, 1974, **et seq.**, by all parties. If additional evidence is presented now by the defendants, other parties will legitimately be entitled to offer additional evidence. It is time these actions, now nearly two years old, came to a conclusion, at least at the trial level. Even after this Memorandum and the entry of the attached decree, there is yet the question of damages. The request for oral argument at this stage, however, is also denied.

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[1]**Pattway v. American Cast Iron Pipe Co.**, 494 F. 2d 211, 258 (5th Cir., 1974); **Brandreaux v. Marine Contracting Co.**, 437 F. 2d 1011, 1017 n. 16 (5th Cir., 1971).

**The Decree**

The Court has this day entered a Decree in the actions. As the parties will recognize, it is substantially the decree as proposed by the plaintiffs. Minor changes, among others, include alterations in some time limits, a less frequent reporting requirement, and additions to reflect the Court's ruling on the applicable limitation with respect to back pay. In addition a change of some substance has been made in the manner of selecting new jobs by members of the two classes. The viewing of jobs by the class member has been postponed until after he knows for which jobs he can qualify. The provision for a sixteen hour tryout on the jobs selected has been eliminated, because the Court feels this to be wasteful and unnecessary so long as the class member has an opportunity to make an informed choice as to the job he wants. This opportunity is amply afforded by the job descriptions, the tour and the view.

The Court has some reservations about the accuracy with which the Company can determine the three jobs for which a class member, particularly one with low seniority, is eligible. Presumably plaintiffs have considered this practical problem in making their proposal, and if it can be accomplished the Court feels that this is the desirable way to proceed.

The Decree has been entered after giving due consideration to American's contention that its terms wil create disruption in the efficient running of American's business. Undoubtedly some disruption is unavoidable. The Court doubts that it will be to the extent voiced by the Company and hopes that it will not be. If, however, carrying out the terms of the Decree results in an inefficient operation for two or three days, or even as much as ten days, the past inequities clearly warrant this temporary loss to eliminate the present effects of those inequities.

The Court would like a prompt hearing to determine the method of calculation and distribution of the back pay award and adjustment to the pension and profit-sharing plans, and to what extent, if any, additional evidence will be necessary to effectuate these determinations. The afternoons of January 10, 17, 24 and 31, 1975, in Alexandria, are available for the

Court. If it is inconvenient to counsel to come to Alexandria, arrangements can be made for such a hearing in Richmond.

Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
December 31st, 1974

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## DECREE

These cases, **John Patterson et al.** v. **The American Tobacco Co.**,[1] **Tobacco Workers International Union and Local 182, Tobacco Workers International Union** (Civil Action No. 101-73-R), and **Equal Employment Opportunity Commission** v. **American Brands, Inc. and Local 182, Tobacco Workers International Union** (Civil Action No. 104-73-R), which were consolidated for trial, came on before the Court, sitting without a jury in July, 1974, limited to the issues of liability for back pay and injunctive relief and those issues having been heard and duly tried, and a Memorandum Opinion[2] and Findings of Fact having been filed by the Court on September 25, 1974, it is now ADJUDGED, ORDERED and DECREED:

The defendants, The American Tobacco Company ("American" or "the Company"), the Tobacco Workers International Union ("International Union"),[3] and Local 182, Tobacco Workers International Union ("Local 182" or "TWIU"), their officers, agents, employees and servants and all persons in active concert or participating with them shall be and are hereby

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[1]All references herein to "American" are to the facilities of The American Tobacco Company, a division of America Brands, Inc., known as the Virginia Branch, the Richmond Branch, and the Richmond Office.

[2]Pursuant to the Court's request, counsel for all parties have conferred and have submitted individual proposed decrees, which have been examined by the Court. Because, in some instances the Court has adopted the proposed language of one or more of the parties, portions of this Decree may vary from the provisions of the Memorandum Opinion; whenever such variations occur, it is the Court's intent that this Decree should be controlling.

[3]The Tobacco Workers International Union ("the International") is not a defendant in the EEOC action (Civil Action No. 104-73-R). In addition to the allegations of racial discrimination raised in **Patterson** (Civil Action No. 101-73-R) the EEOC action contains allegations of sex discrimination. None of the provisions of this decree pertaining to sex discrimination is applicable to the International.

permanently enjoined and restrained from discriminating against the affected classes of black and female employees of the Company as herein described because of their race or sex in violation of Title VII of The Civil Rights Act of 1964, 42 U.S.C. §2000e, **et seq.**, and The Civil Rights Act of 1866, 42 U.S.C. §1981, at the Company's Richmond Branch, Virginia Branch and Richmond Office located in Richmond, Virginia.

I. **The Class and the Affected Class**

1. The class of blacks (Class I) for the purposes of this Decree shall consist of:

> All Black persons, whether currently employed or not, who were employees of the defendant Company on or after July 2, 1965.

2. The affected class of females (Class II) for the purposes of this Decree shall consist of:

> All females, whether currently employed or not, who were employees of the defendant Company on or after July 2, 1965.

II. **The Seniority System**

1. The defendants are enjoined from implementing, maintaining or giving effect to any seniority system, whether pursuant to any collective bargaining agreement or otherwise, which is designed to discriminate or has the effect of discriminating against members of Class I or Class II.

2. The Company shall compile within thirty (30) days from the entry of this Decree:

A. A list of all current employees in order of Company seniority in the TWIU bargaining unit at the Richmond and Virginia Branches indicating race, sex, Company seniority date, branch, job classification and employee identification number.

B. A list of all current black employees as of the date of this Decree, who have worked for the Company at any time since July 2, 1965, in order of Company seniority indicating

Company seniority date, sex, branch, current job classification and employee identification number.

C. A list of all black employees who have worked for the Company at any time since July 2, 1965, who are no longer working for the Company for any reason, indicating the employee's name, sex, branch, Company seniority date, date of termination, reason for termination and employee identification number.

D. A list of all current female employees as of the date of this Decree, who have worked for the Company at any time since July 2, 1965, in order of Company seniority indicating Company seniority date, branch, race, current job classification and employee identification number.

E. A list of all female employees who have worked for the Company at any time since July 2, 1965, who are no longer working for the Company for any reason indicating the employee's name, race, Company seniority date, branch, date of termination, reason for termination and employee identification number.

F. A list of all job classifications by branch in the TWIU bargaining unit (excluding adjuster and overhaul adjuster) by order of wage rate, indicating the number of positions in each classification and the name, Company seniority date, race, sex and employee identification number of each incumbent employee.

3. Within thirty (30) days from the entry of this Decree, the above lists shall be filed with the Court and served on counsel for plaintiffs and the unions. In addition, the list in Section II, 2, A, shall be posted in the normal posting locations at each Branch and shall remain posted until the provisions of Section II of this Decree are concluded.

4. The Company shall implement for TWIU bargaining unit jobs at the Richmond and Virginia Branches the procedure set forth in Paragraphs 5 through 11 below. For the purposes of this procedure, no job qualifications shall be required except the requisite seniority and a willingness to learn the job; provided, however, that for the jobs of adjuster and overhaul adjuster the qualifications listed in Finding of Fact No. 31 shall remain in effect.

5. American shall prepare job descriptions for all TWIU bargaining unit jobs within thirty (30) days after the entry of this Decree, which descriptions (a) are for informational purposes only, (b) are not intended to indicate all of the duties to be performed, and (c) will be used for no purpose other than to inform employees of the general nature of such jobs. Unless plaintiffs object to the job description and provide suggested modifications within fifteen (15) days after receiving a copy of them, such descriptions will be deemed to comply with this Decree. A copy of such job descriptions shall be posted on bulletin boards located in conspicious places at the Richmond and Virginia Branches and a copy shall be furnished to any employee who requests the same.

6. Within fifteen (15) days after copies of job descriptions are posted, all currently employed blacks and females in the TWIU bargaining unit shall be given an opportunity to tour both the Richmond Branch and the Virginia Branch. No such person need be given an opportunity to tour any department to which he has been assigned for thirty (30) days or longer.

A. Within ten (10) days after the expiration of the period prescribed in the preceeding paragraph, all currently employed members of Class I and Class II shall be given the opportunity to select not more than five jobs in order of preference.

B. Within ten (10) days after the expiration of the period described in Section II, 6, A, the Company shall determine the top three jobs on each class member's preference list that the Company reasonably anticipates such class member's seniority would permit him[4] to hold. Should the Company conclude that a Class I or Class II member's seniority would not permit him to ascend to at least three of the jobs on such preference list, that class member shall be given the opportunity to list additional jobs, totaling five when combined with the number of jobs the Company already has anticipated he would hold. The Company again shall determine if such class member's seniority would permit him to ascend to any of the jobs newly selected. This process shall be repeated until there are at least three jobs on such class member's list that the Company rea-

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[4]All references to either gender shall be construed as applying to both genders throughout this Decree.

sonably anticipates would be available to him. If it is determined that a class member's seniority would not permit him to ascend to any job of his selection, that class member shall remain in his original job.

Seniority as used herein is the length of Company service from the most recent date of Company employment.

C. Within thirty (30) days after the expiration of the period prescribed in Section II, 6, B, all currently employed members of Class I and Class II shall be given the opportunity to view the three jobs selected pursuant to that paragraph in operation for a period of not more than one hour each.

7. A. Within five (5) days from the completion of the procedure set forth in Section II, 6 above, each currently employed black and female shall be canvassed personally in the order of decreasing seniority at which time such person shall be given the final opportunity to select the job to which his seniority would entitle him. Any employee who would be displaced from his present job as the result of the "bumping" rights afforded blacks and females under the provisions of this paragraph shall be entitled during the canvass process to select another job to which his seniority would entitle him, and each employee successively displaced shall be entitled to the same right.

B. Upon completion of the canvass, American shall commence implementation of the "bumping" process in order of decreasing seniority.

8. Should such employee entitled to the "bumping" rights as set forth in Section II, 7, elect not to exercise such rights, such election shall be made in writing on the form attached hereto as Exhibit A.

9. Any employee who should elect to exercise the "bumping" rights as set forth in Section II, 7, may elect to be removed from his selected job within fourteen (14) working days after being assigned to said job. Once an employee returns to his original classification as aforesaid, or remains in his selected job more than fourteen (14) days, all of his "bumping" rights shall be ended. Any vacancy which occurs as the result of the return by an employee to his original job within fourteen (14)

working days shall be filled in accordance with the terms and conditions of the collective bargaining agreement between the defendants now in effet.

10. The Company may remove an individual from a position should that individual fail to demonstrate that he is capable of performing the duties of his selected job; provided. however, that in no case may the Company utilize standards more stringent than standards presently utilized.

11. Displayed employees: In the event that any incumbent employee is displaced as a result of the "bumping relief provided for herein and has had to move to a job having a lower rate, such employee shall have his or her wages "red-circled" (a) until the wage level for the job to which the employee has been moved reaches the level at which he was formerly being paid, or (b) until the employee voluntarily moves to a job with a rate lower than the job to which he was displaced, or (c) until the employee moves to a job with a rate equal to or higher than the red-circled rate, or (d) until such time as the employee fails to avail himself of the opportunity to move to a job with a rate higher than the job to which he was displaced; provided, however, that under sub-paragraph 11(d), no displaced employee shall be required to move more than once in each six-month period to a job with an hourly rate higher than the job to which he was displaced, nor shall he be required to move to a job with an hourly rate which is less than five (5) cents per hour above the rate of the job to which he was displaced or which he is occupying at the time.

12. During the canvass provided for in Section II, black employees and white female employees at the Richmond Branch or the Virginia Branch who qualify for "bumping" rights under the provisions of Section II, 7, and who desire to transfer to the other Branch, shall have the right to do so on the basis of their seniority.

### II-A. Company-wide Seniority and Transfer Rights of Currently Employed Class I and Class II Members

After the completion of the procedure outlined in Section II, 5, or, until all Class I and Class II members who indicate their desire to transfer to another Branch have had an opportunity to do so, in accordance with the procedures outlined

herein, the following Company-wide seniority and transfer rights shall be in effect:

1. A Class I or Class II member must indicate such desire on the form attached hereto as Exhibit B within thirty (30) days after the completion of the procedure outlined in Section II, 7.

2. A vacancy shall be as defined in the current collective bargaining agreement between the Company and the Union defendants.

3. Notice of a vacancy shall be posted in conspicuous places at both Branches. All members of Class I and Class II who have indicated their desire to transfer shall be given the opportunity to bid on the job posted.

4. Should such Class I or Class II member be the most senior bidder in terms of Company-wide seniority, he shall be entitled to fill the vacancy.

5. Should such Class I or Class II member transfer, he will carry with him his Company-wide seniority which will be used for all purposes, including promotion or demotion.

6. Should such Class I or Class II member twice refuse an opportunity to transfer to a vacancy for which he is the senior bidder, he thereupon will lose his right to transfer from one Branch to the other.

III. **Supervisory Personnel**

The Company is enjoined from implementing, maintaining or giving effect to any criteria utilized for the selection of supervisory personnel which is designed to or has the effect of discriminating against black or female candidates for supervisory positions.

The Company is ordered to formulate objective criteria for the promotion or selection of supervisory personnel. Job descriptions and selection criteria for supervisory positions shall be formulated in accordance with the procedure set forth in Section II, 5 herein.

Vacancies in assistant foreman and foreman positions at the Richmond Branch and Virginia Branch and vacancies in the

Office Supervisor positions at the Richmond Office shall be filled with blacks and females, except when the Company is unable to hire a qualified black or female, until, (1) the percentage of blacks in supervisory positions approximately equals the percentage of blacks in the Richmond, Virginia, SMSA work force, and (2) the percentage of females in supervisory positions approximately equals the percentage of females in the Richmond, Virginia, SMSA work force. The Company is not required to fill any such position with any person not qualified for it nor is it required to retain any person in any such position if, after a reasonable time, he is unable to perform competently the duties of such position. The decision as aforesaid is that of the Company and will not be disturbed absent a showing of race or sex discrimination.

IV. **Crafts**

For the reasons stated in the Memorandum Opinion, relief with respect to the hiring, training, or promotion of employees for craft positions at the Richmond and Virginia Branches is denied.

V. **Testing**

The screening tests used by the Company in the selection of employees to fill the position of "electronics adjustor" have had no discriminatory effect on blacks or females.

VI. **Hiring**

For the reasons stated in the Memorandum of Opinion, relief with respect to the hiring of hourly paid production workers is denied.

VII. **Back Pay**

1. Hourly-paid[5] blacks who were employees of the defendant Company on or after July 2, 1965, whether currently employed or not, and (2) hourly-paid[5] females whether currently employed or not who were employees of the Company on or after July 2, 1965; shall be entitled to recover back pay from the defendants in an amount to be fixed by subsequent order of this Court and for the period beginning in January, 1967, for Class I employees and April, 1967, for Class II employees.

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[5]Craft employees in jobs which are not covered by the collective bargaining agreement between American and Local 182 are excluded from this definition.

VIII. **Pension and Profit-Sharing Plans**

(1) Hourly-paid blacks who were employees of the defendant Company on or after July 2, 1965, whether currently employed or not; and (2) hourly-paid females who were employees of the company on or after July 2, 1965, whether currently employed or not; shall be entitled to recover from the defendants compensation and adjustments to the pension and profit-sharing plans to recoup benefits lost as a result of the effects of past discrimination, in an amount to be fixed by subsequent order of this Court and for the same period as provided for back pay above.

IX. **Collective Bargaining Agreements**

The collective bargaining agreement now in effect and all subsequent collective bargaining agreements shall remain in, and continue to have, full force and effect, except insofar as such agreements are inconsistent with the provisions of this Decree. Should a conflict arise between the provisions of the collective bargaining agreement and the provisions of this Decree, the terms of this Decree shall prevail.

X. **Notice**

The defendants shall give notice of this Decree to all Company employees and Union members affected thereby, by posting for a period of sixty (60) days copies of this Decree on bulletin boards, located in conspicuous places at its Richmond and Virginia Branches, the Richmond Office, and the Union facilities.

XI. **Costs and Attorneys' Fees**

Plaintiffs are awarded their costs and expenses to be taxed against the defendants. Plaintiffs in **Patterson** are entitled to recover reasonable attorneys' fees and expenses as a part of their costs of this action.

XII. **Reporting Procedure**

1. The defendants shall make bi-annual reports to this Court, the first report being due on March 15, 1975, with copies sent to counsel for plaintiffs, which shall contain:

A. Supervisory positions: (1) a listing of all supervisory vacancies, by title, department, and facility, which have occur-

red since the last report; (2) the name, race, sex, Company seniority date (or date of hire) of the employee selected for the position (3) current rosters showing the name, race, sex, job title, and department for the supervisory personnel at each facility; (4) the name, race, sex, job title, department, and facility of each black or female supervisory employee terminated or demoted during the reporting period, and the reason for the termination or demotion (e.g., dismissal, retirement, etc.).

B. T.W.I.U. bargaining positions: (1) a listing of all job vacancies, by job title, department, and facility which have occurred since the last report; (2) the name, race, sex, Company seniority date, job classification, department, and facility of each employee who bid on the vacant job; (3) the name, employee identification number, race, sex, Company seniority date, job classification, department, and facility of the employee awarded the job; (4) the name, race, sex, Company seniority date, job classification, department, and facility of every black or female employee who was demoted, laid off, or terminated during the last reporting period and the reason for the action.

C. Such reports shall be submitted until March 15, 1976; a similar report shall be submitted on March 15, 1977, after which time the Court shall divest itself of jurisdiction over this matter unless, prior to that date, on application of any party, jurisdiction is extended.

2. No later than thirty (30) days after the selection of the jobs in the Richmond and Virginia Branches required by Section II, **supra,** the defendants shall submit to this Court, with copies to counsel for plaintiffs, the following:

A. The name, race, sex, employee identification number, Company seniority date, wage rate, prior and current job classification, department and facility of each employee who is displaced as a result of the procedure set forth in Section II, **supra.**

B. The name, employee identification number, race, sex, Company seniority date, job classification, and facility of each member of Class I and Class II who has (1) elected not to bid on any position; (2) bid and moved to another position (or

positions), including the title of the new position(s), (3) bid on a position which he was not awarded because of insufficient seniority; or (4) executed a copy of the form attached hereto as Exhibit B. [See attached sheet.]

C. All personnel records, union membership lists, bid sheets, seniority rosters, and other data used in preparing the reports required by this Section, shall be maintained by the defendants at their usual places of business and shall, upon reasonable notice, be made available to counsel for plaintiffs for inspection or copying, together with any other data necessary to evaluate the performance of the defendants under this Decree. Such records shall be maintained and preserved for the duration of this Decree.

Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
December 31st, 1974

# United States District Court

**FOR THE**

**EASTERN DISTRICT OF VIRGINIA**

**RICHMOND DIVISION**

| | |
|---|---|
| JOHN PATTERSON, et al<br>vs.<br>THE AMERICAN TOBACCO CO., et al<br>and<br>EQUAL EMPLOYMENT OPPORTUNITY COMMISSION<br>vs.<br>AMERICAN BRANDS, INC., et al | **Civil Action File No. 101-73-R With CA 104-73-R**<br><br>**JUDGMENT** |

This action came on for trial before the Court, Honorable Albert V. Bryan, Jr., United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the defendants, the American Tobacco Company, the Tobacco Workers International Union, and Local 182, Tobacco Workers International Union, their officers, agents, employees and servants and all persons in active concert or participating with them shall be and are hereby permanently enjoined and restrained from discriminating against the affected classes of black and female employees of the Company as herein described because of their race or sex, as set forth with particularity in the Memorandum Opinion and Decree filed herein on December 31, 1974, which said decree set forth "The Class and the Affected Classes", application of "The Seniority System", the application of "Company-wide Seniority and Transfer Rights of Currently Employed Class I and Class II Members", and the selection of "Supervisory Personnel", and further provided for the entry of a subsequent order determining the recovery of back pay from the defendants and their participation in pension and profit-sharing plans.

It is Further Ordered that the defendants give notice of this decree and make bi-annual reports to this Court; the first re-

port being due March 15, 1975, as set forth with particularity in the Memorandum Opinion and Decree filed herein on December 31, 1974, and plaintiffs are awarded their costs and expenses, taxed against the defendants, with the plaintiffs in Civil Action No. 101-73-R further ordered reasonable attorneys' fees and expenses as part of their costs in this action.

Dated at Richmond Virginia, this 31st day of December, 1974.

W. FARLEY POWERS, Jr.
Clerk of Court

# APPENDIX C

## SUBCHAPTER I.—GENERALLY

### §1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
R.S. §1977.

### §2000e-2. Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

**Employment agency practices**

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

**Labor organization practices**

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

**Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions**

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if

such differentiation is authorized by the provisions of section 206(d) of Title 29.

**Preferential treatment not to be granted on account of existing number or percentage imbalance**

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88-352, Title VII, §703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, §8(a), (b), Mar. 24, 1972, 86 Stat. 109.

**Same: notification of State or local authority: time for action on charges by Commission**

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or politial subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter

period is requested, to act under such State or local law to remedy the practice alleged.

**Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency**

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.